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Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DICO, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition concerns statutory interpretation and Fifth Amendment rights under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), 42 U.S.C. § 9601, *et seq.*

CERCLA expressly grants to parties that have incurred environmental cleanup costs under the Act ("PRP's") the right to obtain contribution from other PRPs who have not yet paid their share of those costs. 42 U.S.C. § 9613(f)(1). These contribution rights serve a critical public function in CERCLA's order: they provide an impetus, that would otherwise not exist, for parties to conduct prompt cleanup of hazardous waste *first*, and to sue other PRPs to recover portions of those cleanup costs *later*.

In contravention of manifest Congressional intent and federal common law, the Eighth Circuit held in this case that CERCLA contribution rights are forever inchoate and can be extinguished through the mechanism of contribution protection offered by the government pursuant to 42 U.S.C. § 9613(f)(2). In so doing, the court below established a national rule that CERCLA contribution rights are subject to complete forfeiture by the government, regardless of whether those rights have become fixed by an administrative or court order, effectively eliminating the judiciary from an intended scheme of checks-and-balances.

Therefore, the questions presented are: (1) when, if ever, does petitioner's contribution claim become a vested property right protected by the Fifth Amendment; and (2) whether CERCLA's contribution provisions allow the government to grant contribution protection if it has the effect of extinguishing a vested contribution claim.

STATEMENT OF THE PARTIES

BP Amoco Oil PLC, BP Amoco PLC, Chevron Chemical Company, Bayer Corporation, Monsanto Company, and Shell Oil Company were defendants below and are being served as respondents herein.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Dico, Inc., is a wholly-owned subsidiary of Dyneer Corporation, itself a wholly-owned subsidiary of Titan International, Inc.

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Petitioner respectfully requests petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Longstaff, C.J.) denying petitioner's motion for an evidentiary hearing and granting respondent's motion for entry of the consent decree (Pet. App. 18a-38a) is not otherwise published. The court of appeals' opinion (per McMillian, J., joined by Arnold and Rosenbaum, J.J. (district judge sitting by designation), affirming (Pet. App. 1a-17a) is published at 277 F.3d 1012. The district court's opinion granting respondent's motion for summary disposition (Pet. App. 39a-52a) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on January 24, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657, relevant to this petition are reprinted in the Appendix at 87a –89a.

STATEMENT OF THE CASE

I. Introduction.

Petitioner is the plaintiff in a related action, which it filed seeking contribution for its environmental cleanup costs from other liable parties under section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1). *Dico v. Amoco Oil Co.*, Civil No. 4-97-10130 (S.D. Iowa, filed February, 1997) ("the contribution claim").

In 1994, petitioner received two Unilateral Administrative Orders from the Environmental Protection Agency (the "EPA"), under the authority of section 106(a) of CERCLA, 42 U.S.C. § 9606(a), directing petitioner, alone, to remediate the Superfund site (the "Site"). It did so at a cost of $5.7 million.[1]

The issuance of the two UAOs triggered the accrual of CERCLA's three year limitations period for contribution claims. 42 U.S.C. § 9613(g)(3)(B). After the Site was remediated, petitioner timely filed its contribution claim in 1997 against the five chemical companies that are the respondents to this petition ("respondent-chemical companies"). Those companies were liable for cleanup costs under CERCLA because they were once customers of a chemical formulation business that likely contributed to the contamination of the Site.

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1. Respondent-chemical companies conducted a separate removal action on the Site pursuant to an Administrative Order On Consent ("AOC") that they negotiated with the EPA. The total cost that they incurred under the AOC was $513,884.37.

Thus, the government forced petitioner alone to expend over 90% of the total PRP remediation costs before the government completed its study of liability for contamination of the Site. That study (called a "Non-Binding Preliminary Allocation of Responsibility") was completed in April 1998, and assigned 61% of responsibility and corresponding cleanup costs to petitioner and 39% of those costs to respondent-chemical companies.

Petitioner maintained its claim through extensive discovery and trial preparation.[2] In 1998 — within approximately 120 days of trial of the contribution claim — petitioner learned that the respondent-chemical companies had negotiated a settlement with the United States (the "government"), which had never been a party to the contribution claim and had no claims pending elsewhere against the respondent-chemical companies.[3]

The settlement caused a consent decree to be entered against the chemical companies. On November 29, 1999, the government filed its complaint in this action pursuant to CERCLA, 42 U.S.C. §§ 9606, 9607, seeking reimbursement of its alleged oversight costs and entry of the consent decree that it filed with its complaint. (Pet. App. 53a-86a, Consent Decree). Petitioner moved and was permitted to intervene in this action, and its contribution claim was stayed pending the district court's review of the consent decree.[4]

2. Petitioner conducted 21 months of discovery, including 21 fact depositions and five expert depositions. As a result, petitioner secured admissions from the respondent-chemical companies to establish their liability as "arrangers" and, thus, liable parties under CERCLA. The only remaining issue for trial was proper allocation of costs between the parties.

3. In 1998, the government invited the parties to negotiate a settlement of its alleged oversight costs. Petitioner declined unless the settlement could address all issues at the Site, including the ongoing dispute between Petitioner and the EPA on oversight costs on previous operable units at the site. (*See United States v. Dico*, 266 F.3d 864 (S.D. Iowa 1995), *petition for writ of cert. filed*, 70 USLW 3552 (Feb. 19, 2002) (No. 01-1223)). Because of a history of disagreement with the EPA regarding these oversight costs, petitioner did not view the EPA as a neutral or fair arbiter of its contribution rights against the respondent-chemical companies, which had already refused to negotiate with petitioner.

4. On December 14, 1999, the decree was published in the Federal Register, 64 Fed. Reg. 69784. Pursuant to 42 U.S.C. § 9622(i), petitioner (Cont'd)

Petitioner objected to the decree because it granted unlimited contribution protection to the respondent-chemical companies under section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2). This protection was provided in Paragraph 22 of the decree, which states:

> The parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) for "matters addressed" in this Consent Degree. "Matters addressed" are Past Response Costs and Future Response Costs in connection with Operable Units No. 2 and 4 whether incurred by the United States or any other person.

(Pet. App. 70a, ¶ 22).

The contribution protection was the carrot that led the respondent-chemical companies to the bargaining table and allowed the government to reap a windfall recovery for itself. The respondent-chemical companies bought their way out of petitioner's contribution claim by paying $2,513,808 plus interest to the government's Hazardous Substance Superfund — an amount that was over $1 million above the government's alleged oversight costs and included a settlement premium that was over $150,000 above the estimated future costs for monitoring of the Site. None of the settlement monies reimbursed petitioner for its $5.7 million in cleanup costs or its over $300,000 in litigation costs.

(Cont'd)

filed extensive comments and objections, to which the government made no substantive response before formally moving to enter the consent decree on March 10, 2000.

Essentially, two opponents ganged up on petitioner by cutting out its rights to a judicial resolution of its contribution claim. Petitioner was already adverse to the government on issues relating to oversight costs on prior operable units for the Site (*see United States v. Dico*, 266 F.3d 864), and it would be anticipated that the same issues would arise here. The respondent-chemical companies were immersed in litigation with petitioner. By cutting their deal the government received all it could ever claim in oversight costs, plus a premium, and the respondent-chemical companies resolved petitioner's contribution claims at the best price they could reasonably anticipate. Petitioner involuntarily paid a large share of the consideration for respondents' settlement in the form of its vested contribution rights and its right to contest the government's oversight cost claims. Without petitioner being stripped of its rights, the settlement would not have happened. The end result from petitioner's perspective is a judicially sanctioned mugging.

Once entered, the consent decree resulted in a forfeiture of both petitioner's contribution rights and its substantial investment in seeking judicial enforcement of those rights. *See Dico, Inc. v. Amoco, et al.*, Civ. No. 4-97-10130, Order (S.D. Iowa, March 13, 2002) (J. Longstaff) (Pet. App. 49a-51a).

The forfeiture of petitioner's pending contribution claim violates petitioner's right to due process and just compensation under the Fifth Amendment. It also violates the express language of section 157 of CERCLA, 42 U.S.C. § 9657, which guarantees that contribution protection will not intrude on vested property rights.

Beyond the claims of the petitioner, the forfeit of contribution rights contravenes Congress's manifest intent to encourage prompt and efficient cleanup of contaminated sites by preserving federal common law contribution rights

and creating a system of checks-and balances to protect those rights. It poses a serious disincentive to potentially responsible parties at other sites, who now have no assurance that their contribution rights resulting from their cleanup activities will be immune from forfeiture by government fiat.

II. The District Court's Decision.

On March 10, 2000, the government formally moved to enter the consent decree. Petitioner opposed that motion and simultaneously moved for an evidentiary hearing.

The district court denied petitioner's motion for an evidentiary hearing finding, in relevant part, that petitioner had no constitutional right to an evidentiary hearing and/or compensation under the Fifth Amendment because the contribution rights afforded by CERCLA § 113(f)(1) "continued to be limited by the statutory language" permitting contribution bars under § 113(f)(2). (Pet. App. 28a).

The district court also granted the government's motion to enter the consent decree, finding it to be procedurally and substantially fair, reasonable, consistent with CERCLA's statutory objectives, and constitutional even with respect to the contribution bar set forth above. The district court entered the decree on September 29, 2000.

III. The Eighth Circuit's Decision.

On petitioner's appeal, the Eighth Circuit affirmed in an opinion remarkable for its brevity and limited analysis. The circuit court held that petitioner had no vested property interest in the contribution claim at the time the government moved for entry of the consent decree. (Pet. App. 10a). The opinion below cites only the statutory language itself to support its holding. Its entire analysis is that petitioner:

> . . . did not have a right to contribution at the time the government moved for entry of the consent decree. The basis for [petitioner's] statutory contribution claim . . . is § 9613(f)(1) . . . , which is subject to and limited by § 9613(f)(2). . . . In other words, [petitioner] never had a vested property interest to be taken. [*Id.* at 9a-10a.]

For the same circular reason, the circuit court rejected petitioner's contention that the consent decree was manifestly unreasonable and inconsistent with CERCLA, which included the argument that the decree is unconstitutional. The Eighth Circuit stated:

> Regarding [petitioner's] argument based upon the contribution protection provided to the [respondent-chemical companies], we emphasize that such protection is explicitly authorized under 42 U.S.C. § 9613(f)(2). [*Id.* at 16a.]

The legal principle established by the Eighth Circuit is that a PRP who has remediated a site under an Unilateral Administrative Order can never have a vested and, thus, constitutionally protected property right based on CERCLA § 9613(f)(1), no matter how vigorously such rights are exercised, or whether the rights have been reduced to a fixed amount by an administrative or court order.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. *First*, the Eighth Circuit's opinion incorrectly interprets the CERCLA statute by ignoring manifest Congressional intent to codify a contribution right that is capable of vestiture, and, in fact, vests when a PRP's liability under CERCLA is established in an administrative or court order against that PRP. *See* CERCLA, 42 U.S.C. §§ 9613(g)(3), 9657. It also conflicts with decisions of this Court and of other circuits which establish that parties can have vested property rights in claims that have become fixed or have been reduced to judgment.

Second, the Eight Circuit's decision subverts Congressional intent to enact a statutory scheme that protects contribution rights once they become vested property rights and it disengages CERCLA's important statutory checks and balances on governmental settlement authority and power. It establishes a rule in conflict with the common law and statutory text. It tells the government that it can always strip contribution rights from a party who has remediated a site; no matter the time, the circumstances, the amount of investment in the assertion of the claims, or even the reduction of the claims to judgment.

Third, the Eighth Circuit's judgment, as a practical matter, sets a national rule that undermines a PRP's incentive to focus on prompt remediation first and on remediation costs second. Review should be granted to prevent this irreversible, nationwide harm.

I. Certiorari Is Warranted Because The Decision Below Conflicts With Federal Common Law And With Manifest Congressional Intent To Codify A Vested And Constitutionally-Protected Contribution Right.

As originally enacted, CERCLA did not expressly provide for a right to contribution among parties found to be jointly and severally liable under the Act. However, in construing the 1980 statute, courts found an implied right of contribution among PRPs. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986) (listing cases recognizing an implied right of contribution of CERCLA); *United States v. New Castle County*, 642 F. Supp. 1258, 1266-69 (D. Del. 1986) (discussing legislative history); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486-1490 (D. Colo. 1985); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1255-57 (S. D. Ill. 1984); *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 579 F. Supp. 823, 844-45 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986).[5]

Congress clarified and confirmed this "implied right" of contribution in the 1986 SARA amendments to CERCLA, P.L. 99-499, § 101, *et seq.*, which added the following two-part provision regarding contribution:

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5. Cases claiming that there never was an implied right of contribution under CERCLA, repeatedly cite to *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 45 U.S. 630, 638, 101 S. Ct. 2061, 2065, 68 L. Ed. 2d 500 (1981), for the proposition that statutory contribution rights do not exist as a matter of federal common law. *See United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027, 1050 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990). However, *Texas Industries* and its progeny are inapposite. Those cases do not address CERCLA. And those cases stand for the proposition that rights created by Congress can be subsequently limited or repealed by Congress. First, in this case, the contribution rights at issue were codified, not created, by Congress. Second, Congress is not limiting those rights; the EPA and the United States Department of Justice are.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. §§ 9613(f)(1), (2) (emphasis added) (respectively referenced as "subsection (f)(1)" or "subsection (f)(2)").[6]

6. *See* House of Judiciary Committee "Explanation of Purpose and Intent," 131 CONG. REC. 34645 (Section 113 "clarifies the availability of judicial review regarding contribution claims and (Cont'd)

This petition seeks a resolution by this Court of the inherent tension between these competing contribution provisions — subsection (f)(1), which expressly recognizes a PRP's right of contribution and vests jurisdiction for allocation of response costs in the judicial branch, and subsection (f)(2), which curtails that right and shields PRP's who settle with the government from contribution claims by other PRPs.

The Eighth Circuit opinion incorrectly resolves the conflict in favor of the settlement protection afforded under (f)(2). It holds that subsection (f)(1) creates a contribution "right" that is *a priori* not a vested right because it is always subject to complete divestiture by the settlement protection afforded in subsection (f)(2). The Eighth Circuit, therefore, found that petitioner's contribution claim was not, and implicitly could not ever become, a property right protected by the Fifth Amendment.

The Eighth Circuit's sweeping holding is remarkable for its lack of case law, statutory or analytical support.

(Cont'd)

settlements"); S. Rep. No. 99-11, 99th Cong., 1st Sess. 42 (1985) (the bill "clarifies and confirms existing law" by adding contribution provision); 131 CONG. REC.- SENATE 24450 (statement of Sen. Stafford, sponsor of S. 51) (amendment would "remove any doubt as to the right of contribution . . . . despite several recent district court cases correctly confirming that we intended the law to confer such a right"). H.R. 2817 and S. 51 were the House and Senate bills, respectively, that ultimately became the SARA amendments.

See also H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 1, at 79 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861; *id.* pt. 3, at 18, *reprinted in* 1986 U.S.C.C.A.N. at 3041; H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1, at 80 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862; *id.* pt. 3, at 18-19, *reprinted in* 1986 U.S.C.C.A.N. at 3041-42.

The holding explicitly rests on a mere recitation of the language in subsections (f)(1) and (f)(2). And it implicitly rests on an erroneous assumption that Congress intended to create a self-limiting and purely inchoate contribution right — a right that could never vest, but was always subject to forfeit.

The Eighth Circuit's assumption is contradicted by federal common law and by two separate statutory provisions. First, section 157 of the Act, 42 U.S.C. § 9657, is manifest evidence of Congressional intent to codify a right that is capable of vesting and is protected by the Fifth Amendment when it does vest.

Second, CERCLA's separate limitation period for contribution actions arising out of Unilateral Administrative Orders is a manifestation of Congress's intent that, when the government enters such an order against a PRP, that PRP's contribution rights vest and the government cannot subsequently usurp those rights without providing due process and just compensation under the Fifth Amendment. See 42 U.S.C. § 9613(g)(3)(B).

A. Congress Codified A Contribution Right Capable Of Vesting And Thus Becoming Constitutionally Protected Property Under The Fifth Amendment.

The Fifth Amendment prohibits the government from extinguishing rights and taking "private property" without providing just compensation and procedural due process. U.S. CONST. Amend. V.[7] A two-step inquiry that turns on notions of "justice and fairness" determines whether a constitutionally-proscribed taking has occurred:

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7. In relevant part, the Fifth Amendment provides: ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. Amend. V.

(1) is the subject matter constitutionally-protected property within the meaning of the Fifth Amendment; and (2) if so, has there been a taking of that property? *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 523-24, 118 S. Ct. 2123, 2146, 141 L. Ed. 2d 451 (1998).

Constitutionally protected "property" is not created by the Constitution; instead, it is created and its "dimensions are defined by existing rules or understandings that stem from an independent source," such as state or federal statutes, regulations or common law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709; 33 L. Ed. 2d 548 (1972). A cause of action is a species of property entitled to Fifth Amendment protection. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865, 313 (1950)). The determination of whether a particular claim constitutes constitutionally-protected property involves an "essentially ad hoc, factual inquir[y]" that turns on the nature of the property right and the governmental taking. *Penn Cent. Transport. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978).

The Eighth Circuit's holding that CERCLA contribution rights are incapable of becoming vested property rights is incorrect because it erroneously and impliedly assumes that Congress created the right. As shown above, the right was codified and clarified, but was not created, by Congress. Long before the SARA amendments to CERCLA, federal common law recognized an "implied" right of contribution.

The Eighth Circuit's holding is also contrary to manifest Congressional intent to codify a contribution right capable of rising to the level of a vested, constitutionally-protected property right. That intent is expressed in section 157 of the

Act, entitled "Separability of provisions; contribution," which provides:

> If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of the chapter shall not be affected thereby. If an administrative settlement under section 9622 of this title has the effect of limiting any person's right to contribution from any party to such settlement, *and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States*, such person shall not be entitled, under laws of the United States, to recover compensation from the United States for such taking, but in any such case, *such a limitation on the right to obtain contribution shall be treated as having no force or effect.*

42 U.S.C. § 9657 (emphasis added).

If Congress intended to create only an inchoate contribution right, it would not have enacted the italicized clause above. In that clause, Congress clearly anticipates that contribution rights will vest and, equally clearly, proscribes the government from "taking" those rights in the course of providing contribution protection. The Eighth Circuit's holding is untenable because it renders this provision surplusage and, in so doing, subverts explicit Congressional intent to codify a right that could vest.

B. Petitioner's Contribution Right Vested When The Government Imposed An Unilateral Administrative Order Against Petitioner.

Petitioner's appeal presented the circuit court with a case of first impression because no published federal precedent had determined how or when a CERCLA contribution claim vests and becomes a property right protected by the Fifth Amendment. One unpublished case tackled the issue in dicta. *United States v. Maryland Sand, Gravel & Stone Co.*, Civ. No. HAR-89-2869, 1994 W.L. 541069 (D. Md. 1994).[8] The opinion below ignores the *Maryland Sand* case, however, and avoids this issue by determining that petitioner could never have a vested contribution right. In so doing, the Eighth Circuit established a rule that conflicts with Congressional

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8. In *Maryland Sand*, two non-settling PRP's claimed that the government violated their constitutional due process rights by negotiating a consent decree without them because the terms of the decree foreclosed their potential, statutory contribution claims against the settling PRP's. *Id.* at *10. The district court held that the non-settling parties had no constitutionally protected interest in a potential contribution claim because neither had filed a claim at the time that the consent decree was negotiated and entered. *Id.* The court found that ". . . a close reading of CERCLA's contribution provisions indicates that the right to seek contribution does not exist *until* a recovery action has been initiated." *Id.* (emphasis added). The court further speculated that, even if it had found that the right to contribution was constitutionally protected property "at the time the EPA settled with other PRPs," meaning before a contribution action had been filed, such a right would be limited to PRPs who had not reached a settlement with the EPA. *Id.* at 10 n.29.

Under *Maryland Sand*, petitioner's contribution rights became fixed when it filed its contribution claim in 1997 — three years before the government moved to enter its consent decree with respondents-chemical companies. Petitioner maintains that its contribution rights vested at an earlier point in time — when the government imposed two UAOs against it.

intent and well-established federal common law recognizing that rights in a cause of action vest when they become "fixed."

CERCLA provides the government with three means of implicating private parties in environmental cleanup. It can file an abatement action, commonly referred to as a cost recovery claim, in federal court. 42 U.S.C. § 9606(a). Or it can opt to take the administrative route and either (1) negotiate an Administrative Order on Consent with the private party or, (2) when negotiation is not possible, issue an Unilateral Administrative Order against that party. 42 U.S.C. § 9606(a). The government has unbridled authority to determine both the route that it will take and the parties with whom it will travel.

If the government decides to issue an UAO, the subject of that Order has no choice but to comply. CERCLA imposes daily fines up to $25,000 for violations of any terms of an UAO. 42 U.S.C. § 9606(b)(1). The benefit the government secures under an UAO is significant. It obtains immediate remediation of the Site by a private party, without having to compromise, negotiate, or incur any costs (other than "oversight" costs, which virtually all of the federal circuits have determined the government can recover from PRPs).

By contrast, as its name indicates, an Administrative Order on Consent requires negotiation and some compromise by the government before remediation begins. And when the government files a cost recovery claim, it must incur litigation costs and the attendant delays before the defendants to the action remediate the site.

There is a toll, however, that the government must pay for the expediency of an UAO. It surrenders any right that it may have had to bargain away the contribution rights of the subject of the UAO. This toll is manifest in the limitations

period that Congress established for contribution claims arising out of UAOs. While § 113(g)(3) of the Act prescribes an across-the-board three year limitations period for contribution claims, it establishes a distinct accrual date for contribution actions based on administrative orders. Congress determined that the limitation period runs from "the date of judgment in any action under this chapter for recovery of such costs or damages," or from "*the date of an administrative order* under . . . section 9622(h) . . . or entry of a judicially approved settlement with respect to such costs or damages." 42 U.S.C. §§ 9613(g)(3)(A) and (B) (emphasis added), respectively. In prescribing these distinct accrual dates, Congress recognized that a PRP's liability under CERCLA becomes fixed at different points in time depending upon the process that the EPA chooses to impose such liability. For an administrative order, the right accrues when the order is entered.

The only reasonable interpretation of the Act is that the contribution rights that it recognizes vest when they accrue for purposes of the statutory limitations period. First, this interpretation is consistent with well-established federal precedent. When the government chooses to use an UAO, liability becomes fixed at the date of issuance — when liability exists independent of the statute. Federal common law recognizes that a cause of action vests when the individual party's claim becomes "fixed," whether the cause of action derives from statutory or common law rights. *See Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) (claim based on state law materialman's lien was vested property right); *Coombes v. Getz*, 285 U.S. 434, 439-48, 52 S. Ct. 435, 76 L. Ed. 866 (1932) (holding that repealed rule of law created vested contract rights in a corporate charter); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 339-40, 42 S. Ct. 325, 66 L. Ed. 647 (1922) (recognizing vested right to a fixed sum of money); *Ettor v. City of Tacoma*, 228 U.S.

148, 155-58, 33 S. Ct. 428, 57 L. Ed. 773 (1913) (holding that a statutory right to compensation for property damage caused by street-graders was vested and could not be retroactively destroyed); *Omnia Commercial, Co. v. United States*, 261 U.S. 502, 508, 43 S. Ct. 437, 437-38, 67 L. Ed. 773 (1923) (holding that assignee's rights under steel production contract were vested property rights); *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994), *rehear den'd, en banc suggestion den'd*, (Dec. 1974); *In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982), *cert. denied by, Pan American World Airways, Inc. v. Causey*, 493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989) (recognizing, in dicta, that claims for compensation are Fifth Amendment property rights, including the plaintiff's wrongful death claims). In these cases, the rights were deemed to have "vested" because they were manifested in real property, contracts, or fixed sums of money and thus existed independent of the statute or common law that created them. This Court has also held that statutory rights vest once they are reduced to judgment. *McCullough v. Virginia*, 172 U.S. 102, 123-24, 19 S. Ct. 134, 43 L. Ed. 382 (1898); *see also Johnston v. Cigna Corp.*, 14 F.3d 486, 491 (10th Cir. 1993) (quoting *McCullough* and noting that it "remains valid law").

Second, if a PRP's contribution rights did not vest when the UAO was entered, then PRPs would be forced into an untenable and unavoidable "Catch 22." If a PRP did not file its contribution claim within three years of the UAO, it would lose that claim. But, even if it filed suit within that time period, it would be at risk to incur substantial costs pursuing an ephemeral remedy that is subject to forfeit by the government at any time and without any compensation to the PRP. In fact, in this case, the limitations period for petitioner's contribution claim, which accrued in 1994, expired in 1997 — almost two years before the government

and the respondent-chemical companies notified petitioner that they were engaged in serious settlement negotiations that may have the effect of extinguishing petitioners two-year-pending, multi-million dollar contribution claim.

Third, the only way to effectuate Congressional intent to encourage prompt remediation is to interpret the date of the UAO as the date of vesting. Congress provided the government with authority to offer contribution protection under subsection 113(f)(2) in order to lure private parties to the negotiation table and, in so doing, allow the parties and the government to buy their way out of protracted litigation and to focus on remediation. However, when the government issues an UAO, there is no negotiation, no threat of protracted and expensive litigation, and no right to implicate other potentially liable parties under the Act. In fact, in this case, the government forced petitioner to remediate the Site under two UAO's before the government completed its investigation of the Site and before it fully pursued other responsible PRPs.

Contrary to evident Congressional intent, the opinion below allows the government to force cleanup through an UAO, and the draconian penalties that follow from failure to comply, *and* to deprive the recipient of all opportunity to seek contribution from others who may be equally or even more responsible. Indeed, that is what happened here. Petitioner, whose predecessor company owned the Site for only a matter of months while pesticide formulation was being operated by a tenant, paid the lion's share of pesticide cleanup made necessary by the respondent-chemical companies' pesticide formulation activities which had taken place over two decades.

Thus, the Eighth Circuit's decision merits review and reversal by this Court because it ignores manifest Congressional intent and established precedent that

recognizes that petitioner's contribution rights vested when the government entered an Unilateral Administrative Order against it.

II. Certiorari Is Necessary Because The Decision Below Conflicts With Congress's Intended Statutory Scheme, Whereby Vested CERCLA Contribution Rights Trump Contribution Protection Clauses.

The Eighth Circuit opinion cannot stand because it overrides Congressional intent, rather than effectuates it. Congress recognized three limits on contribution protection. It is the circuit court's summary disavowal of the third limit that warrants certiorari in this case.

The first limitation imposed by Congress is an internal one that is exercised by the parties to the settlement. The limit stems from Congress's mandate that contribution protection exists only for "matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). Contribution protection is thus neither automatic, as the government had argued to the district court, nor determined solely by reference to CERCLA's statutory provisions. It must, instead, be bargained for and set forth in the consent decree itself. In this case, the respondent-chemical companies and the government negotiated the "matters addressed" clause so as to broadly encompass petitioner's contribution claim. (Pet. App. 70a).

The second limit Congress prescribed is external; it is imposed by court review in accordance with equitable principles. Section 113(f)(1), which establishes a PRP's right to contribution under CERCLA, requires that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Based

on this provision, a court cannot impose an inequitable resolution when resolving contribution claims, whether that resolution occurs in a contribution case or in a judicially approved settlement.

Congress's third limit is imposed by the United States Constitution and is ultimately enforced by the Courts, either before or after a Decree is executed and/or entered. This limit is expressly imposed on administrative settlements, where (and arguably because) there is no pre-execution judicial review of consent decrees. 42 U.S.C. § 9657 (Pet. App. 89a). It is contained in section 157 of the Act, which expressly voids a contribution bar to the extent that the bar "has the effect of limiting any person's *right* to obtain contribution from any party to such settlement, *and if the effect of such limitation would constitute a taking* without just compensation in violation of the Fifth Amendment of the Constitution. . . ." 42 U.S.C. § 9657 (emphasis added).

Where there is pre-entry judicial review of settlements, section 157's constitutional limit is implied. Congress trusted that the courts would insure that settlement terms, including the scope of the definition of the "matters addressed" by the decree, were constitutional. And, in fact, this is just one of the required checks a reviewing court must conduct before approving a consent decree. *See Cannons Eng'g Corp.*, 720 F. Supp at 1036.

The legislative history surrounding the passage of the SARA amendments evidences Congress's concern that consent decrees not trample constitution rights of non-settling PRPs in any case. *See* H.R. Rep. No. 253(I), 99th Cong., 1st Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2862. It also indicates that Congress never endorsed the instant situation where the district court refused to

consolidate petitioner's contribution claim with the government's action to enter the consent decree, (which action was filed two years after the filing of the contribution claim), and then entered the consent decree which usurped the contribution claim in its entirety and with no compensation to petitioner. Instead, Congress intended and recognized that:

> *. . . Private parties may be more willing to assume the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others.*
>
> In addition to encouraging settlement, the section will help bring an increased measure of finality to settlements. Responsible parties who have entered into a judicially approved good faith settlement under the Act will be protected from paying any additional response costs to other responsible parties in a contribution action.
>
> The section contemplates that *if an action under section 106 or 107 of the Act is under way, any related claims for contribution or indemnification may be brought in such an action. This provision should also encourage private party settlements and cleanup since the actuality of being brought into litigation as a third-party defendant, concurrent with the original litigation, has the effect of bringing all such responsible parties to the bargaining table at an early date. In addition, this provision will lessen any ill will that is created between the government and the original defendants selected by the government for naming in the original suit. This provision allows all counterclaims, cross-claims and third-party*

> *actions to be dealt with in a single action if the court is so inclined.* District courts should carefully manage cases filed pursuant to this section to insure that the litigation is conducted in an expenditious [sic] manner and is not unduly delayed by the concurrent maintenance of third party actions. Among the tools available to the court for management are the exercise of strict judicial control over multi-party proceedings, designation of a representative defendant for service of papers, as well as use of the procedures set forth in the ***Manual for Complex Litigation***.
>
> As with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law. Although the only defenses to liability remain those set forth in Section 107(b), *courts are to resolve such claims on a case-by-case basis, taking into account relevant equitable considerations.*

Id. at 2682 (italicized emphasis added) (bold italics in original). Congress thus fully contemplated that CERCLA's contribution protection would be evaluated and administered in relation to pending claims for contribution protection and would be resolved according to equitable principles. Nowhere did Congress provide for the automatic, uncontestable forfeiture of contribution rights.

The circuit court opinion has the statutory scheme backwards. The Eighth Circuit has held that, to they extent they conflict, the contribution protection clause in section (f)(2) trumps the contribution rights afforded under section (f)(1). Under the Eighth Circuit's holding, equitable and constitutional limits are deleted from the Congressional text, and the government and settling PRPs have unprecedented , unlimited and unrestrained power to extinguish any and all third-party claims and rights no matter how vested or valuable these rights may be. This is an indefensible result.

Because the Eighth Circuit's holding subverts Congressional intent and negates CERCLA's intended checks and balances, it merits review and reversal by this Court.

III. The Decision Must Be Reversed Because It Sets An Untenable National Rule That Significantly Undermines Private Party Cleanup Of Environmental Waste Nationwide.

The Eighth Circuit's judgment, as a practical matter, sets a national rule that completely undercuts a PRP's incentive to focus on prompt remediation first and itself and its remediation costs, second. Review should be granted to prevent this irreversible, nationwide harm.

In *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994), *rehear. den'd.* (August 1994), the Seventh Circuit refused to interpret the phrase "matter addressed" in a contribution bar clause to include the non-settling PRPs' cost recovery claims. The Court's refusal is based on a recognition that contribution rights must be enforceable to accomplish prompt remediation, one of CERCLA's key statutory objectives. The court reasoned:

> We are convinced that a contrary outcome would leave firms like Akzo in an untenable position. *A party served with a unilateral order under section 106 has little choice but to comply*; the statute places strict limits on prior judicial review of such orders and authorizes fines of up to $25,000 per day for a party who refuses to obey. . . . *To subsequently preclude a compliant party from seeking contribution for the sums it has expended simply because it had the misfortune to be drafted by the EPA before a remedial plan could be prepared and a settlement negotiated will not expedite cooperative environmental remediation.*

> If defendants were permitted to settle with the government for part of the clean-up costs of a site, and then become immune from suit for contribution by private entities who paid for ***other*** cleanup costs, it would defeat the policy of CERCLA. *Settling PRPs should not be made to pay twice for the same clean-ups, but they also should not get a windfall because they settled.*

Id. at 768-769 (italicized emphasis added) (bold italics in original) (citations omitted). A similar warning was heralded by the First Circuit, which recognized that:

> [i]n addition, the government has a serious disincentive to collude with later settlors to cut off the right of prior settlors. . . . It is the government that is the *repeat* player in the world of CERCLA clean-ups. Should the government develop a reputation for cheating early settlors, that would deter settlement in later cleanups . . . and hence, in the long run, hurt the government's interests.

United States v. Charter Internat'l Oil Co., 83 F.3d 510, 518 n.11 (1st Cir. 1996) (holding that the consent decree at issue did not extinguish contribution rights of previously-settling PRP's) (italics in original).

The potential dangers of unfettered governmental double-recovery and settling-PRP windfalls have been actualized in this case. Petitioner was issued two Unilateral Administrative Orders and incurred over $5.7 million and 90% of clean-up costs *before* the government and respondent-chemical companies ever expressed an interest in settlement. Nonetheless, the government used petitioner's two-year pending contribution claim to force other PRP's to the

bargaining table and then forfeited that claim in its entirety with no compensation to petitioner. This action is not only arbitrary, it undermines one of the few incentives that CERCLA provides PRPs to focus on environmental cleanup first and the millions that they spend towards that end later.

The rule established by the opinion below must be reviewed and reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JANUARY 24, 2002

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-3906

United States of America,

Plaintiff-Appellee,

v.

BP Amoco Oil PLC; BP Amoco PLC; Chevron Chemical Company; Bayer Corporation; Monsanto Company; Shell Oil Company,

Defendants-Appellees.

DICO, Inc.,

Intervenor-Appellant.

Appeal from the United States District Court for the Southern District of Iowa

Submitted: June 13, 2001

Filed: January 24, 2002

Appendix A

Before McMILLIAN and RICHARD S. ARNOLD, Circuit Judges, and ROSENBAUM,[1] District Judge.

McMILLIAN, Circuit Judge.

The United States of America ("the government"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), brought the present action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, in the United States District Court[2] for the Southern District of Iowa, against BP Amoco Oil PLC, BP Amoco PLC, Chevron Chemical Company, Bayer Corporation, Monsanto Company, and Shell Oil Company, seeking reimbursement of costs incurred by the government in cleaning up a site located in Des Moines, Iowa, contaminated with trichloroethylene ("TCE") and other hazardous substances. Dico, Inc. ("Dico"), an intervenor in the action, now appeals from a final order of the district court granting the government's motion to enter a proposed consent decree ("the consent decree"), denying Dico's request for an evidentiary hearing on the government's motion to enter the consent decree, and denying Dico's motion to consolidate this action with *Dico v. Amoco Oil Co.*, No. 4-97-10130 (S.D. Iowa 1997) ("the contribution action"). *United States v. BP Amoco Oil PLC*, No. 4-99-10671 (S.D. Iowa Sept. 29, 2000) ("slip op."). For reversal, Dico argues that the district court (1) abused its

1. The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota, sitting by designation.

2. The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa.

discretion and violated Dico's constitutional rights in failing to hold an evidentiary hearing and (2) abused its discretion in approving and entering the consent decree. For the reasons set forth below, we affirm.

Jurisdiction was proper in the district court based upon 28 U.S.C. § 1331. Jurisdiction is proper in this court based upon 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a).

Background

The following is a summary of the factual and procedural background, as set forth in the district court's order of September 29, 2000. *See* slip op. at 1-5.

In 1974, TCE was detected in water coming from underground wells located near property owned by Dico and maintained by the Des Moines Water Works. The EPA designated the area the "Des Moines TCE Site" and placed it on the national priority list. The Des Moines TCE Site was divided into several "operable units." Operable Unit-2 ("OU-2") and Operable Unit-4 ("OU-4") (together "OU-2/4") are within Dico's property. Each was found to be contaminated with TCE, and OU-4 was also found to be contaminated with herbicides and pesticides.

Dico's corporate predecessor, Di-Chem, had operated a chemical formulation business on the Dico property until the 1970s. In 1994, pursuant to two Unilateral Administrative Orders issued by the EPA, Dico conducted two removal actions at OU-2/4. A group of former customers of Di-Chem (BP Amoco

Oil PLC, BP Amoco PLC, Chevron Chemical Co., Bayer Corp., Monsanto Co., and Shell Oil Co.) conducted a third removal action pursuant to an Administrative Order on Consent. The EPA also incurred costs associated with the removal actions at OU-2/4.

In 1996, the EPA signed a Record of Decision ("ROD"), which confirmed the completion of the three removal actions at OU-2/4. The former Di-Chem customers requested settlement negotiations with the government regarding the costs associated with the OU-2/4 cleanup efforts. Pursuant to CERCLA, 42 U.S.C. § 9622(e)(3), the EPA undertook a nonbinding preliminary allocation of responsibility ("NBAR") and allocated 61% of the responsibility to Dico and 39% to the former Di-Chem customers collectively. In April 1998, the EPA formally notified the former Di-Chem customers and Dico that they were potentially responsible parties ("PRPs") and provided them each with copies of the NBAR and a proposed consent decree. The PRPs were also notified that settlement with the government would provide protection from liability in the contribution action brought by Dico, arising out of the same remediation. Dico did not respond to the letter and did not participate in the settlement negotiations, despite repeated invitations by the government to do so. On November 2, 1998, when an agreement was imminent between the government and the former Di-Chem customers, the government sent Dico a reminder that a final consent decree would include contribution liability protection for the "settling defendants."

On November 29, 1999, the government filed the present action in the district court and simultaneously lodged the proposed consent decree, as signed by the government and

the former Di-Chem customers (hereinafter referred to as "the settling defendants"). As required by CERCLA, 42 U.S.C. § 9622(d)(2), the consent decree was published in the Federal Register, in response to which Dico submitted objections and comments. Dico also moved in the district court to intervene in the present action and to consolidate it with the contribution action, which it had filed against the settling defendants in 1997. The district court granted Dico's motion to intervene, but deferred ruling on Dico's motion to consolidate the two actions.

On March 10, 2000, the government formally moved to enter the consent decree. Dico requested an evidentiary hearing on the government's motion to enter the consent decree, arguing that (1) a hearing was necessary because the government had failed to provide a fair and complete record and (2) it had a vested property interest in the contribution action, which, under the Fifth Amendment, could not be "taken" without due process (i.e., an evidentiary hearing) and just compensation.

Upon review of the parties' submissions, the district court entered the order from which Dico now appeals. The district court denied Dico's request for an evidentiary hearing, reasoning that a hearing was not necessary to supplement the record because Dico had been provided sufficient opportunities to supplement the record before and after the consent decree had been lodged in the district court. *See* slip op. at 5-9. The district court also rejected Dico's assertion of a constitutional right to an evidentiary hearing, reasoning that Dico never had a right to contribution because its statutory contribution claim was at all times limited by 42 U.S.C.

§ 9613(f)(2) ("A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."). *See id.* at 8-9. Next, the district court granted the government's motion to enter the consent decree. Upon careful consideration of the parties' arguments and the record before it, the district court concluded that the consent decree had resulted from a fair process, that it was substantively fair, and that it was reasonable and consistent with CERCLA. *See id.* at 9-17. The district court then denied as moot Dico's motion to consolidate the contribution action with the action at bar. *See id.* at 17.

Judgment was entered accordingly, and Dico appealed. Both the government and the settling defendants oppose Dico's appeal.

Discussion

Denial of Dico's motion for an evidentiary hearing

Dico first argues that the district court improperly denied its motion for an evidentiary hearing. Dico contends that the administrative record was incomplete, biased, and inaccurate, and that an evidentiary hearing was the only meaningful way for Dico to rebut the government's evidence. Dico asserts, among other things, that the district court erroneously relied on the settlement process as a basis for concluding that Dico had been given an opportunity to supplement the record. On the contrary, Dico argues, the settlement process offered nothing more than an opportunity for Dico to bargain away

its contribution rights. Dico also points out that it was notified of the potential settlement between the government and the settling defendants only after Dico had already invested approximately $5.7 million in response costs and $300,000 in litigation costs. Therefore, Dico argues, its refusal to participate in the settlement negotiations was justified. Dico further maintains that a hearing was necessary to examine the evidentiary basis for a nine-page sworn statement by Daniel Shiel, an EPA attorney, whose statement was submitted by the government in support of its motion for entry of the consent decree. Shiel's statement (hereinafter "the Shiel declaration") purported to explain, among other things, the government's methodology in assigning 61% and 39% of the responsibility to Dico and the settling defendants, respectively, using eight specific factors.[3] According to Dico, the Shiel declaration

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3. The district court set forth the eight factors used in the EPA's analysis as follows:

> 1) distinguishable costs (based on specific wastes of specific waste types); 2) degree of involvement in management or operations at the facility; 3) degree of care (including measures taken by a party to prevent or minimize contamination); 4) fault (culpability and actual cause of the contamination); 5) degree of cooperation (degree to which a PRP cooperates or assists in cleanup efforts); 6) financial capability (whether the PRP is financially viable); 7) financial benefits derived from waste-producing activity; and 8) financial benefits derived from remediation.

United States v. BP Amoco Oil PLC, No. 4-99-10671, slip op. at 11 n.4 (S.D. Iowa Sept. 29, 2000) (citing NBAR Guidance, published at 52 Fed.Reg. 19919 (May 28, 1987)).

was the government's primary evidence in support of the EPA's 61/39 liability allocation, the Shiel declaration did not include or identify supporting documentation, and Dico was entitled to examine Shiel under oath regarding the bases for his assertions. Likewise, Dico contends, the government's allegations of costs were not adequately supported by the evidence in the record and therefore should have been subjected to examination, which only an evidentiary hearing could have adequately provided.

Alternatively, Dico argues that its constitutional rights were violated as a result of the district court's denial of its motion for an evidentiary hearing. Dico maintains that it paid well more than its fair share of the remediation costs and also notes that it filed its contribution claim before the government ever sought to have the consent decree entered. Therefore, Dico contends, at the time it filed its motion for an evidentiary hearing, its contribution claim had become a vested property interest,[4] which could not be "taken" without

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4. In support of its argument that it had a vested property interest in its contribution claim, Dico cites 42 U.S.C. § 9657, which provides in part:

> If an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contribution shall be treated as having no force and effect.

just compensation and due process of the law, as recognized in *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (due process requires that procedures be tailored, in light of the decision to be made, to ensure a meaningful opportunity to be heard).

We review the district court's denial of Dico's request for an evidentiary hearing for an abuse of discretion. *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997) (*Union Electric*) (quoting *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992) ("It is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree.")). We agree with the district court that Dico was given a meaningful and sufficient opportunity to present arguments and submit evidence in opposition to the government's motion to enter the consent decree. Therefore, while Shiel's live testimony might have been helpful in this context, we cannot say that it was an abuse of discretion for the district court to decide that an evidentiary hearing was not necessary. *Accord United States v. Cannons Engineering Corp.*, 899 F.2d 79, 93-94 (1st Cir. 1990) (*Cannons Engineering*) (holding that district court did not abuse its discretion in declining to hold evidentiary hearing on government's motion for entry of consent decrees).

We further conclude that Dico's constitutional argument is without merit. To begin, we agree with the district court that Dico did not have a right to contribution at the time the government moved for entry of the consent decree. The basis for Dico's statutory contribution claim against the settling defendants is § 9613(f)(1) ("Any person may seek contribution from any other person who is liable or potentially liable under

section 9607(a) of this title . . ."), which is subject to and limited by § 9613(f)(2) ("A person who has resolved its liability to the United States . . . in [a] judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."). In other words, Dico never had a vested property interest to be taken.[5] Moreover, an evidentiary hearing would not have been required as a matter of due process. Due process is a "flexible concept that varies with the particular situation," and its "fundamental requirement . . . is the opportunity to be heard at a meaningful time and in a meaningful manner." *Winegar v. Des Moines Independent Community Sch. Dist.*, 20 F.3d 895, 899-900 (8th Cir. 1994) (citing *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *Mathews v. Eldridge*, 424 U.S. at 333), *cert. denied*, 513 U.S. 964 (1994). Due process does not always require an evidentiary hearing, even where a significant interest is at stake. *See, e.g., United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983) (due process does not mandate an evidentiary hearing to establish the accuracy of a presentence investigation report before such report can be considered by district court for sentencing purposes). As we have stated, Dico was, in any event, given a meaningful opportunity to be heard.

Grant of the government's motion to enter the consent decree

Dico next contends that the district court improperly granted the government's motion for entry of the consent decree. Dico maintains that the consent decree is fatally

5. Because Dico did not have a vested property interest to be "taken," 42 U.S.C. § 9657 was not implicated by the district court's decision.

flawed in all essential respects: procedural and substantive fairness, reasonableness, and consistency with the meaning and purposes of CERCLA. *See Cannons Engineering,* 899 F.2d at 85 ("Reasonableness, fairness, and fidelity to the statute are . . . the horses which district judges must ride.").

Dico argues that the consent decree resulted from a procedurally unfair settlement process. Dico disputes the district court's reasoning that Dico, having refused to participate in the settlement negotiations despite the government's repeated invitations, was foreclosed from arguing that the settlement process was unfair. On the contrary, Dico again argues, the entire process was fundamentally unfair from the beginning and therefore Dico was justified in refusing to participate. According to Dico, it had already paid the vast majority of the response costs for OU-2/4 when the government invited it to participate in the negotiations, upon the express assumption that any resulting consent decree would give the "settling defendants" protection from contribution liability to Dico. That offer of contribution protection made by the government to the other PRPs, Dico argues, was unnecessary and fundamentally unfair to Dico.

Dico further argues that the consent decree is substantively unfair. Dico cites *Cannons Engineering,* 899 F.2d at 87, for the proposition that, to be substantively fair, settlement terms must be "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done." Dico maintains that the EPA lacked a rational basis for: (1) assigning Dico 61% responsibility for the overall

Appendix A

OU-2/4 response costs compared with 39% responsibility assigned to the settling defendants, (2) assigning to Dico the entire amount of "volatile organic chemicals" (VOC) remediation and oversight costs, and (3) including complete protection for the settling defendants from contribution liability to Dico. Dico contends that the district court merely rubber stamped the EPA's actions by wholly adopting Shiel's unsubstantiated and contradicted conclusory allegations which purported to justify the consent decree based upon the eight factors: distinguishable costs, degree of involvement, degree of care, fault, degree of cooperation, financial capability, financial benefit from waste-producing activities, and financial benefits from the remediation. Regarding distinguishable costs, Dico argues that the district court blindly adopted Shiel's claim that Dico should pay 100% of the VOC remediation costs, even though the NBAR allegedly suggested that those costs were indistinguishable from costs for which the settling defendants were responsible. Regarding degree of involvement and financial benefit from the waste-producing activities, Dico argues that the evidence in the record does not show that either Dico or any of its corporate predecessors conducted or benefitted from the formulation process, while the settling defendants were arrangers of the formulation process and thus were more involved in, and benefitted more from, the generation of hazardous wastes. As to Dico's degree of care and fault, Dico argues that short term releases and flooding at the OU-2/4 area caused contamination for which Dico cannot be blamed. As to the degree of cooperation, Dico contends that the district court ignored Dico's removal actions and only considered its decision not to participate in the settlement negotiations. Regarding relative financial capabilities, Dico argues that, contrary to

the EPA's and the district court's apparent assumptions, the settling defendants have vastly greater resources than Dico. Finally, as to financial benefits, Dico suggests that it has suffered more of a loss than a benefit because it has already paid the vast majority of the response costs. Dico thus concludes that the district court abused its discretion in holding that the consent decree fairly allocates liability among the parties.

Finally, Dico argues that the consent decree is manifestly unreasonable and inconsistent with the underlying objectives of CERCLA. Dico contends that, in this particular case, the consent decree penalizes the party that forthrightly remediated at its own expense, takes undue advantage of the party with the weaker bargaining strength, and awards the government costs to which it is not entitled. Therefore, Dico continues, the consent decree violates CERCLA's objectives by sending the message that contribution rights are illusory and the best strategy to minimize one's exposure is outright refusal to incur any response costs. The end result, Dico concludes, will be to discourage prompt and efficient cleanup efforts, to undercut PRP confidence in the CERCLA process, and to render meaningless contribution rights under 42 U.S.C. § 9613(f)(1).

We review the district court's decision to grant the government's motion to enter the consent decree for an abuse of discretion. *Union Electric,* 132 F.3d at 430. We will not reverse unless Dico has shown that the district court committed a material error of law or a " 'meaningful error in judgment.' " *Cannons Engineering,* 899 F.2d at 84 (quoting *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988)). In the present case, the district court's order granting the government's

motion for entry of the consent decree reveals to us that the district court carefully considered the underlying facts and legal arguments and did not mechanistically "rubber stamp" the consent decree, as Dico suggests. We therefore exercise restraint on review — because we are deferring both to the EPA's inherent experience and expertise in handling such matters and to the district court's carefully-exercised informed discretion. *Id.* ("on appeal, a district court's approval of a consent decree in CERCLA litigation is encased in a double layer of swaddling"), *quoted in Union Electric,* 132 F.3d at 430. Dico therefore bears a heavy burden to establish a basis for reversal. *See Cannons Engineering,* 899 F.2d at 84 ("The doubly required deference . . . places a heavy burden on those who purpose to upset a trial judge's approval of a consent decree.").

To begin, we cannot agree with Dico's claims that the settlement process was inherently unfair and that Dico was justified in refusing to participate because its contribution rights were at stake. Nothing in the record suggests that the government and the settling defendants were not negotiating in good faith and at arm's length. *See id.* (respect for agency's role is heightened where "the cards are dealt face up" and parties with conflicting interests "hammer out an agreement at arm's length"). Moreover, Dico failed even to make a good faith effort to participate in the negotiations. Dico had the opportunity, through the settlement process, to express and defend its position and to seek reimbursement of past expenditures; by contrast, Dico's refusal even to come to the table precluded its position from ever being heard or considered. As for Dico's claim that it was not necessary for the EPA to offer the settling defendants protection against

exposure to contribution liability, that assertion is debatable,[6] but, in any event, beside the point. By providing contribution protection to the settling defendants, the government neither exceeded nor abused its authority. Indeed, providing protection from exposure to duplicate liability promoted fairness in the overall process.

We next consider the substantive fairness of the consent decree, a matter particularly appropriate for our deferential review. "Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which is it legally responsible." *Id.* at 87. In the present case, we agree with the district court's conclusion that the consent decree reflects a reasonable allocation of legal responsibility between Dico and the settling defendants. Dico was not inappropriately assigned complete responsibility for the VOC-related costs, because those costs were found to be related to operations of Dico or one of its corporate predecessors, but could not be traced to the settling defendants. *See* slip op. at 11-12. As the district court concluded, the costs resulting from pesticide contamination were reasonably split between Dico and the settling defendants. *See id.* at 12. Regarding the

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6. 42 U.S.C. § 9613(f)(2) provides:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potentially liability of the others by the amount of the settlement.

parties' relative roles in managing the pertinent operations, the relative degree of care they exercised, their relative fault, and the relative benefits to them from the waste-producing activity, we agree with the district court that there is factual and evidentiary support for the EPA's decision to assign most of the responsibility to Dico, as the "entity in charge of the facility." *See id.* at 12-13. As to factors such as the degree of cooperation and the benefit of the remediation to the parties, we note that Dico conducted the first and second removal actions at OU-2/4 only after the EPA obtained unilateral administrative orders commanding Dico to do so. *See id.* at 13. By contrast, the third removal action was performed by the settling defendants pursuant to an administrative consent order. Each of the three removal actions benefitted Dico, as the owner of the property. Finally, although the exact amounts of response costs incurred by the parties are subject to debate, it appears from the record that Dico's share constitutes significantly less than the 90% Dico claims.

Finally, we reject Dico's assertions that the consent decree is manifestly unreasonable and inconsistent with CERCLA. Regarding Dico's argument based upon the contribution protection provided to the settling defendants, we emphasize that such protection is explicitly authorized under 42 U.S.C. § 9613(f)(2). Moreover, the contribution protection is reasonable and consistent with the underlying policies and goals of CERCLA because it prevents duplicate liability and encourages cooperation with the government, thereby serving the goals of efficient and effective environmental cleanup and regulation.

In sum, we hold that the district court did not abuse its discretion in entering the consent decree upon determining that it is sufficiently fair, reasonable, and consistent with CERCLA.

Conclusion

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION DATED AND FILED SEPTEMBER 29, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 4-99-10671

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BP AMOCO OIL, *et al.*,

Defendant.

ORDER

THE COURT HAS BEFORE IT intervenor Dico, Inc.'s ("Dico") motion to intervene and consolidate, filed January 14, 2000. In a memorandum filed February 11, 2000, the United States resisted the motion to consolidate but did not resist the motion to intervene. Defendants BP Amoco PLC, Chevron Chemical Company, Bayer Corporation, Monsanto Company and Shell Oil Company (collectively "the settling defendants" or "present defendants") joined in the United States' memorandum response on February 17, 2000. The Court held a telephonic hearing on February 22, 2000. In an order issued the same day, the Court granted Dico's

motion to intervene and deferred ruling on its motion to consolidate pending a ruling as to whether Dico is entitled to an evidentiary hearing on the United States' anticipated motion to enter consent decree.

On March 10, 2000, the United States formally moved for entry of consent decree. Dico resisted the motion on June 19, 2000 and the United States filed a reply on July 14, 2000. The settling defendants filed a separate memorandum joining in the United States' reply on the same day.

Meanwhile, on June 15, 2000, Dico moved for an evidentiary hearing on the entry of the consent decree. The United States resisted Dico's motion to hold an evidentiary hearing on July 14, 2000 and Dico filed a reply on July 24, 2000. Due to its impact on the remaining two motions, the Court will consider this latter motion first.

I. BACKGROUND

In 1974, trichloroethylene ("TCE") was found in the Des Moines Water Works ("DMWW") public drinking water supply. The Environmental Protection Agency (the "EPA") traced the source of the contamination to water drawn into the north section, or gallery, of underground wells maintained by the DMWW. The DMWW is located west of the Dico property, separated from Dico by the Raccoon River. Because of the proximity to the DMWW, the EPA proposed and ended up placing the Des Moines TCE Site ("the Site") on a national priority list.

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The EPA divided the response activities at the Site into four Operable Units. Operable Unit 2 ("OU-2"), one of the two operable units at issue in the present case, called for a removal action to address actions to mitigate the release of hazardous substances including volatile organic compounds ("VOCs") into the ground water. During the course of the OU-2 remedial investigation, portions of the site were found to be contaminated with pesticides and herbicides. The area contaminated with pesticides and herbicides was separated from the OU-2 study and designated as Operable Unit ("OU-4").

There have been three removal actions at OU-2 and OU-4. Dico conducted two of these removal actions in 1994, pursuant to two separate Unilateral Administrative Orders issued by the EPA. The third removal action was conducted pursuant to an Administrative Order on Consent by the defendants to the present action. The present defendants were once customers of Di-Chem, a chemical formulation business located on the Site until the early 1970s and predecessor to Dico. Accordingly, the present defendants have been designated during the course of the investigations and removal actions as the Di-Chem Customer Group ("DCCG").

The EPA signed a Record of Decision regarding OU-2 and OU-4 in 1996, which affirmed the clean-up work conducted under the three removal actions and determined that the only remaining response actions for the Site are long term Operations and Maintenance ("O&M") of the removals, and institutional controls to ensure the property is not used for residential purposes.

Shortly thereafter, the DCCG indicated a desire to negotiate a complete settlement with the United States for the OU-2 and OU-4 costs. The EPA subsequently undertook a Nonbinding Preliminary Allocation of Responsibility ("NBAR") as provided in section 122(e)(3) of CERCLA, 42 U.S.C. § 9622(e)(3).

The NBAR is a process that the EPA uses to promote expedited settlement. In performing the NBAR, the EPA considers a number of factors, assigning points to each factor to be divided between the parties, with a total of 100 points available for all factors. Based on the NBAR evaluation, the EPA assigned a 61% share of responsibility to Dico and a 39% share to the DCCG.

In April 1998, the EPA issued a Special Notice Letter to Dico and DCCG, the potentially responsible parties ("PRPs"), informing them of their potential liability for the OU-2 and -4 costs. With the letter was the NBAR and a proposed Consent Decree. The proposed Consent Decree indicated that defendants who reached a settlement with the EPA would be protected from liability in the contribution action filed by Dico. Dico did not respond to the Special Notice Letter, and did not participate in the ensuing settlement negotiations.[1]

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1. Dico claims it did not respond to the Special Notice Letter because: 1) the EPA had already forced Dico to incur 90 percent of the clean-up costs, and thus, the EPA had no legitimate claims remaining against Dico for which settlement could be negotiated; and 2) Dico had no reason to negotiate a settlement agreement outside of its pending contribution claim, because the only purpose for such negotiations would be to "bargain away Dico's contribution rights." Dico's Memorandum in Opposition to the United States' Motion to Enter Consent Decree, at 8.

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Despite Dico's lack of participation, the EPA and DCCG continued to aprise Dico of the settlement negotiations, as well as specific terms being discussed. On June 12, 1998 and August 13, 1998, the EPA wrote to Dico and its parent company, Titan Wheel, to again encourage Dico's participation in the settlement. Dico did not respond to these letters.

On November 2, 1998, counsel for the United States Department of Justice wrote to notify Dico that a settlement between the United States and DCCG was imminent, explicitly reminding Dico that the final Consent Decree would include contribution protection for the DCCG, also known as the "settling defendants."

On November 29, 1999, the United States filed the above-captioned action against the DCCG, and lodged the Consent Decree on the same date. Pursuant to section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), the Department of Justice published the proposed Consent Decree in the Federal Register for comment. 64 Fed. Reg. 69784 (Dec. 14, 1999). Dico submitted Objections and Comments to the Department of Justice, and on January 14, 2000, moved to intervene and consolidate this action with *Dico v. Amoco*, No. 4-97-CV-10130 (S.D. Iowa 1997). As mentioned earlier, this Court granted Dico's motion to intervene upon consent from the United States and the settling defendants, but deferred ruling on Dico's motion to consolidate. On March 10, 2000, the United States formally moved to enter the Consent Decree.

Dico now moves for an evidentiary hearing on the United States' motion to enter consent decree, arguing the United States has failed to provide the Court with a fair and complete record. Dico also argues it has a constitutional right to an evidentiary hearing under the Fifth Amendment because Dico's Contribution Claim is a vested property interest that cannot be "taken" by the government without due process and just compensation.

II. DICO'S MOTION FOR EVIDENTIARY HEARING

"[I]t is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree." *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992) (citing *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 93-94 (1st Cir. 1990)). As explained by the First Circuit, the need for such a hearing turns on whether " 'the parties have a fair opportunity to present relevant facts and arguments to the court, and to counter their opponent's submissions.' " *United States v. Comunidades Unidas Contra La Contaminacion* (*"Comunidades Unidas"*), 204 F.3d 275, 278 (1st Cir. 2000) (quoting *Cannons Eng'g*, 899 F.2d at 94).

A. Whether Administrative Record Warrants Supplementation

Dico contends in the present case that it has been denied a fair opportunity to present its facts and arguments to the Court. In particular, it contends an evidentiary hearing is necessary to enable this Court to evaluate the consent decree based on a full administrative record. This Court disagrees.

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The evidence shows the EPA first initiated settlement negotiations on April 23, 1998, by sending letters to all potentially responsible parties pursuant to section 122(e)(1) of CERCLA. Declaration of Daniel J. Shiel, at. 1, Exhibit 1 to Memorandum in Support of United States' Motion to Enter Consent Decree ("Shiel Declaration"). This letter advised PRPs the EPA had selected a final remediation action for OU-2 and -4, and invited settlement offers. *Id.* at 2; *see also* Exhibit A to Shiel Declaration. After receiving this letter, the DCCG notified the EPA it was interested in negotiating as a group. *Id.* Although neither Dico nor Titan Wheel responded to the EPA's letter, the EPA nevertheless sent a second letter dated June 12, 1998, inviting Dico to participate in an upcoming settlement conference. *Id.*, *see also* Exhibit B to Shiel Declaration. After receiving a proposed settlement offer from the DCCG, the EPA contacted Dico yet a third time, urging them to engage in settlement talks. *Id.* at 3; *see also* Exhibit C to Shiel Affidavit.

Dico failed to respond to any of the three letters. *Id.* In its memorandum in opposition to the United States' motion to enter consent decree, Dico contends it chose not to respond to the EPA's letters because it felt it had already been treated unfairly, having been forced to incur more than its share of the clean-up costs. Dico's Memorandum in Opposition to the United States' Motion to Enter Consent Decree, at 8. It also resented the EPA and settling defendants' efforts to "bargain away" Dico's contribution rights. *Id.*

The fact Dico refused to participate in settlement negotiations and meet with the EPA and other PRPs does not change the fact that the EPA *offered* Dico numerous

opportunities to voice its concerns and bargain with the EPA and other PRPs. The Court agrees with the United States that it would be wholely inappropriate to hold a "mini-trial" on allocation issues discussed during settlement negotiations in which Dico was invited to participate, but stubbornly ignored. *See, e.g., Stewart v. M.D.F., Inc.*, 83 F.3d 247, 252 (8th Cir. 1996) (stressing importance of protecting confidentiality of settlement agreements, for "fear that informal remarks will be seized upon to create new liabilities").

Perhaps most importantly, however, once the EPA formally lodged the proposed consent decree, Dico had additional opportunities to make its record, and took advantage of such opportunities. Dico not only filed comments with the EPA during the public notice and comment period, but also filed a voluminous Appendix with this Court in opposition to the United States' motion to enter consent decree. In *Metropolitan St. Louis Sewer Dist.*, the Eighth Circuit affirmed the lower court's decision not to hold an evidentiary hearing on whether to enter the environmental consent decree based on the fact the intervenors had the opportunity to submit objections to the EPA during the public notice and comment period, and to file them separately with the district court. Specifically, the court noted: "Once the intervenors had an opportunity to file objections to the proposed consent decree, '[t]here is little else they could have done.' " *Metropolitan St. Louis Sewer Dist.*, 952 F.2d at 1044 (quoting *United States Environmental Protection Agency v. City of Green Forest*, 921 F.2d 1394, 1402 (8th Cir. 1990)). As in *Metropolitan St. Louis Sewer Dist.*, *Comunidades Unidas* and *Cannons Eng'g*, the Court finds Dico has had a "fair opportunity to present relevant facts and arguments to

the court, and to counter [its] opponent's submissions." *United States v. Comunidades Unidas Contra La Contaminacion* (*"Comunidades Unidas"*), 204 F.3d 275, 278 (1st Cir. 2000) (quoting *Cannons Eng'g*, 899 F.2d at 94).

B. Whether Dico Has a Constitutional Right to an Evidentiary Hearing

Dico also contends the contribution bar contained in the consent decree acts as a taking without just compensation and due process of law. Accordingly, Dico claims it has a right to an evidentiary hearing under the Fifth Amendment to the United States Constitution. Although this issue has not been addressed by the Eighth Circuit, the First Circuit implied in *Cannons Eng'g* that CERCLA's contribution bar could not deprive the nonsettling PRPs of any constitutionally protected interest because CERCLA itself, rather than federal common law, created the right to contribution. *Cannons Eng'g*, 899 F.2d at 92 n.6. As argued by the United States, if Congress creates a right, it can certainly place internal limits on that right without raising constitutional implications. This is not a situation in which Congress *retroactively* narrowed rights previously created.[2] CERCLA section 113(f)(1), which authorizes actions for contribution, and section 113(f)(2), which protects a party who reaches a settlement with the United States or any State from

2. Clearly, the Takings Clause is implicated if Congressional limits are imposed *retroactively*. In such a case, the Court must then consider: 1) the economic impact of the Congressional act or regulation on the aggrieved party; 2) whether the law interferes with investment-backed expectations; and 3) the nature of the government action. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523-24 (1998).

liability under an action from contribution, were enacted simultaneously in 1986. *See* Pub. L. No. 99-499, 100 Stat. 1613 (1986).[3]

The primary authority cited by Dico, *United States v. Maryland Sand, Gravel & Stone Co.*, Civ. A. No. HAR 89-2869, 1994 WL 541069 (D. Md. Aug. 12, 1994) does not alter the Court's conclusion. In *Maryland Sand*, two nonsettling PRPs in a CERCLA action argued the EPA violated their due process rights by failing to invite them to

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3. Subsection (f) provides in relevant part:

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . .

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f).

join in the settlement agreement, and upon executing the consent decree, extinguishing their right to go against the settling defendants in a subsequent contribution action. *Id.* at *9. The court held the nonsettling defendants did not have a constitutionally protected interest because neither had filed a contribution action at the time the consent decree was negotiated and entered. *Id.* at *10. The court explicitly acknowledged, however, that even if it had found the right to contribution was a constitutionally protected property interest before a contribution action had been filed, such a right was limited to those PRPs that had not reached a settlement with the EPA. *Id.* at 10 n. 29. In essence, the court held that regardless of when the right to contribution rose to a constitutional level, the right continued to be limited by the statutory language.

The Court therefore finds the Takings Clause is not implicated by extinguishing Dico's right of contribution against the settling defendants. Accordingly, Dico has no constitutional right to an evidentiary hearing. Furthermore, the Court does not believe the record should be reopened at this juncture in order to allow Dico to produce evidence it could have submitted in earlier administrative proceedings and/or in resisting the present motion to enter the Consent Decree. Dico's motion for an evidentiary hearing is DENIED.

III. UNITED STATES' MOTION TO ENTER CONSENT DECREE

This Court must review the proposed consent decree "for fairness, reasonableness, and consistency with CERCLA." *United States v. Union Electric Co.*, 132 F.3d 422, 430 (8th Cir. 1997) (citing *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d at 1044).

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A. Procedural Fairness

As held by the First Circuit in *United States v. Cannons Engineering*, "fairness in the CERLCA settlement context has both procedural and substantive components. . . . To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance. *Cannons Eng'g Corp.*, 899 F.2d at 86 (citations omitted). In the present case, the Court finds the EPA negotiated in good faith with the settling defendants, and attempted on several occasions to include Dico in the process. Moreover, when Dico failed to respond to the EPA's invitations to join settlement discussions, the EPA nevertheless continued to keep Dico informed of the negotiations process, and provide details of the proposed settlement agreement. *See* Attachments A, B, and C to Shiel Declaration.

Dico argues the negotiations process was procedurally unfair because it effectively rewarded "recalcitrant parties who came very late to the remediations," and did so only to seek protection from Dico's contribution action. Dico's Memorandum in Opposition to the United States' Motion to Enter Consent Decree ("Dico's Memorandum") at 15. The settling defendants' *motivation* for seeking settlement does not affect the procedural fairness of the process, however. There is no evidence the United States and the DCCG negotiated at less than arms length, nor is there evidence the parties conducted their negotiations in anything but an open fashion. On the contrary, the EPA *invited* Dico to join the discussions, and continued to inform Dico of the negotiated terms thereafter. Dico's repeated boycott of the settlement negotiations effectively forecloses any argument that it was treated unfairly during the process.

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B. Substantive Fairness

"Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." *Cannons Eng'g Corp.*, 899 F.2d at 87. In effect, substantive fairness is akin to comparative fault. *Id.*

In evaluating the substantive fairness of the proposed Consent Decree, this Court must defer to the EPA's expertise, and "approve of the method proposed by the government unless it is 'arbitrary, capricious, and devoid of a rational basis.' " *United States v. Union Electric Co.*, 934 F. Supp. 324, 328 (E.D. Mo. 1996), *aff'd*, 132 F.3d 422, 430 (8th Cir. 1997) (citing *Cannons Eng'g Corp.*, 899 F.2d at 87). "While [the Court] should not mechanistically rubberstamp the agency's suggestions, neither should it approach the merits of the contemplated settlement *de novo*." *Cannons Eng'g Corp.*, 899 F.2d at 84. In the present case, the EPA based its allocation of fault on a number of factors, assigning points to each factor to be divided between the parties.[4] A total of 100 points is available for all factors. After assigning

4. The factors considered by the EPA, commonly known as the "Gore factors," were: 1) distinguishable costs (based on specific wastes of specific waste types); 2) degree of involvement in management or operations at the facility; 3) degree of care (including measures taken by a party to prevent or minimize contamination); 4) fault (culpability and actual cause of the contamination); 5) degree of cooperation (degree to which a PRP cooperates or assists in cleanup efforts); 6) financial capability (whether the PRP is financially viable); 7) financial benefits derived from waste-producing activity; and 8) financial benefits derived from remediation. *See* NBAR Guidance, published at 52 Fed. Reg. 19919 (May 28, 1987).

points based on all eight factors, the EPA determined Dico was responsible for 61% of the response costs, and the DCCG were responsible for 39%.

Dico argues the consent decree is substantively unfair because the percentages were assigned arbitrarily. Close review of Daniel Shiel's declaration reveals the percentages were not arbitrary, however, but plausible estimates of the parties' respective faults.[5] With regard to distinguishable costs, the first factor, the EPA divided the response costs between those attributable to volatile organic chemicals ("VOCs"), including trichloroethylene ("TCE"), and those arising from pesticide contamination. Shiel Declaration, at 3. Because it considered Dico exclusively responsible for costs related to VOCs, the EPA allocated 100% of VOC costs to Dico. It then divided responsibility for costs arising from pesticide contamination evenly between Dico and the DCCG. The Court finds this approach both reasonable and appropriate.

With regard to the second factor, degree of involvement, Mr. Shiel explained that because Dico *and its corporate predecessors*[6] owned the property and operated the chemical

5. The Court acknowledges it has no jurisdiction to directly review the NBAR prepared by the EPA. 42 U.S.C. § 122(e)(3)(C). The NBAR is relevant to this Court's review, however, to the extent Mr. Shiel relies on specific NBAR factors in justifying the United States final allocation of fault.

6. *See* Exhibit A to Dico's Memorandum in Opposition to the United States' Motion to Enter Consent Decree, at 3. ("Dico/Titan and its predecessors have owned this property since 1941 or 1942. Dico/Titan and its predecessors owned the property at the time hazardous substances were disposed of there.").

business that formulated the herbicides and pesticides identified at the site, Dico received 8 of the 10 possible points for this factor. Sheil Declaration at 3. The Court cannot find this rationale unreasonable-even assuming many of the DCCG supplied raw materials, and were substantial customers of Dico and/or Dico's successor, Dichem, Inc. Similarly, the fact some of the DCCG may have retained control over product specifications is not synonymous with managing the facility as a whole. Significantly, Dico does not allege the DCCG had any involvement in the disposal of hazardous wastes and/or cleanup of spills.

Dico next challenges the EPA's allocation to Dico of 80% of the points for degree of care and 70% of the fault points based on Dico's "poor housekeeping." In support of this argument, Dico points to the deposition testimony of Monsanto and Chevron agents that the on-site formulation activity was well-maintained. *See* Exhibit V to Dico's Memorandum in Opposition to the United States' Motion to Enter Consent Decree, Deposition of Edward Take at 25-26, Deposition of Jack Handley at 67-68 (generally describing Dichem as a clean facility). Again, however, the fact two Monsanto and Chevron employees believed the facility looked to be well-maintained does not erase the fact that herbicide and pesticide contamination was found throughout the Site. The EPA reasonably determined that such widespread contamination more likely was caused by repeated exposure to chemical waste and spills, as opposed to short-term releases. In such a case, the entity in charge of the facility, Dico, should bear the brunt of the liability.

The next factor is degree of cooperation. Dico contends it clearly cooperated with the EPA, based on the fact it allegedly paid more than 90% of the remediation costs. As noted by the EPA, however, Dico did not voluntarily participate in the remediation efforts. Rather, the EPA was forced to obtain unilateral administrative orders to ensure Dico's participation in the OU-1 remedial action, and two OU-2/4 removal actions. Accordingly, the Court finds assigning Dico 3 of 5 possible points for degree of cooperation is both reasonable and appropriate.

Dico also challenges the EPA's 50-50 split on the sixth and seventh factors, financial-capability and financial benefits derived from the waste-producing activity. Dico contends this even split is grossly unfair due to the fact the settling defendants all are multi-billion dollar entities, and Dico is now a "largely defunct manufacturing operation that has virtually depleted all of its assets remediating the Site." Dico's Memorandum in Opposition to the United States' Motion to Enter Consent Decree, at 20. Despite being granted the opportunity to intervene in the present action and file a voluminous appendix, however, Dico has failed to produce financial evidence to support this allegation. Similarly, although Dico claims it did not receive financial benefit from its formulation activities, the record shows Dico voluntarily contracted with the DCCG to formulate various chemicals for them on its property. Exhibit A to Dico's Memorandum in Opposition to the United States Motion to Enter Consent Decree, at 4-5. Absent evidence to the contrary, the Court presumes Dico was monetarily compensated for performing these services.

Lastly, Dico contends it should not be assigned all five points for financial benefits derived from remediation. In its memorandum, Dico contends that it has exhausted its resources cleaning up the Site, and that even though the Site is fully remediated, because of its history of environmental contamination, no one would ever consider purchasing the property. Again, Dico has failed to produce financial data to support this allegation, nor has it submitted an independent appraisal to suggest the land is in fact "worthless."

Because the EPA has provided a "plausible explanation" for its apportionment of liability on each of the factors considered, this Court is bound to uphold its percentages. *Cannons Eng'g*, 899 F.2d at 87.

C. Whether Dico Should Incur all Costs for VOC Investigation

Dico next argues there is no rational basis or record support for the United States' assignment of $782,117.00 in VOC investigation and oversight costs exclusively to Dico.[7] Dico claims the EPA's own documents suggest the VOC contamination and the pesticide/herbicide contamination "commingled," and absent a reasonable basis to apportion liability, the costs cannot and should not be split. *See, e.g., Weyerhauser Co. v. Koppers Co., Inc.*, 771 F. Supp. 1420, 1425 (D. Md. 1991) (noting "divisibility is the touchstone of apportionment of liability" under CERCLA section 9607).

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7. Daniel Sheil stated in his declaration that before applying the 61% -39% split to pesticide and herbicide costs for OU-2/4, the EPA determined which costs were VOC costs, which it assigned exclusively to Dico. Shiel Affidavit, at 5.

This Court understands Dico's concern regarding this issue. Nevertheless, Dico confuses the more stringent standard for recovery against a PRP under section 9607 with the *administrative tool* developed by the EPA to encourage prompt settlement. *See* 42 U.S.C. § 9622(e). Although the precise division of responsibility for OU-2/4 remediation costs may have been unknown to the EPA during settlement negotiations with the DCCG, and may still be indeterminable based on the commingling of various contaminants, the EPA has produced a plausible explanation for its allocation of costs, which will not now be disturbed by this Court. *Cannons Eng'g*, 899 F.2d at 87.

D. Whether the Contribution Bar is Substantively Unfair

Dico next contends the contribution bar contained in the Consent Decree and authorized under CERCLA section 113(f)(2) is substantively unfair, because it forces Dico to incur more than its allocated share of past response costs, and effectively penalizes Dico for its prompt remediation efforts. As noted in *Cannons Engineering*, however, "Congress explicitly created a statutory framework that left nonsettlors at risk of bearing a disproportionate amount of liability.' *Id.* at 91; *see also United States v. Atlas Minerals & Chemicals, Inc.*, 851 F. Supp. 639, 654 (E.D. Pa. 1994) (citing *Cannons Eng'g*). Dico has not, nor could it argue, that it was denied an equal opportunity to negotiate a settlement with the EPA that may have resulted in a more favorable apportionment of liability.

Dico's renewed argument that the government is not entitled to collect oversight costs has been addressed by this Court in related litigation, *see United States v. Dico*, Civ. No. 4-95-10289 (S.D. Iowa 1999), and will not be addressed at this juncture.

E. Reasonableness

"Whether a consent decree is reasonable involves consideration of the technical adequacy of the remedies proposed and the adequacy of the settling defendants' obligations to cover the response costs, particularly weighed against the savings represented by settlement over litigation." *Union Electric Co.*, 934 F. Supp, at 331 (internal citation omitted). Although Dico has challenged the United States' right to recover for certain types of response costs, it has not formally questioned the technical adequacy of the remedies proposed.

With regard to Dico's argument that the establishment of a Special Account to pay for future work at the Site effectively "steals" Dico's money, the Court notes that paragraph 7 of the Consent Decree contemplates that all Special Account funds be allocated for use at the Site within two years of the date of entry of the Consent Decree. Consent Decree, ¶ 7.

F. Consistency with CERCLA

Before this Court may approve entry of a consent decree, it must also ensure the settlement is consistent with CERCLA's objectives to ensure accountability and prompt remedial action. *Cannons Eng'g*, 899 F.2d at 90. As noted

by Dico, because the vast majority of the remedial action contemplated at the Site will have been performed prior to entry of the Consent Decree, only the former of these two objectives is at issue in the present case. Because the Court is satisfied that the EPA's allocation of fault bears a reasonable relationship to the actual percentages of fault, whatever those may be, the Court finds entry of the Consent Decree to be consistent with CERCLA objectives.

The Court is not troubled by the fairness or unfairness of CERCLA's contribution bar. Section 113 clearly was enacted to encourage prompt settlement with the understanding that nonsettling parties may be forced to spend more than their proportionate share of response costs. In the present case, Dico made a conscious decision to avoid the negotiation process knowing that any settlement reached between the EPA and the DCCG may prevent it from recovering separately from the DCCG. If Dico believed the EPA's preliminary evaluation resulted in unfair allocations of fault, it should have addressed those concerns early on at the bargaining table, when the EPA was in a position to listen to Dico's arguments, and make revisions, if appropriate. By choosing to ignore the process entirely, however, Dico lost both its bargaining ability with the EPA, and any leverage it may have gained to contest the Consent Decree in the present forum. The United States' motion to enter consent decree is GRANTED.

Appendix B

IV. DICO'S MOTION TO CONSOLIDATE

This Court's ruling on the United States' motion to enter consent decree resolved all outstanding issues in the above-captioned matter. Accordingly, Dico's motion to consolidate its contribution action, *Dico, Inc. v. Amoco Oil Co.*, Civ. No. 4-97-10130 (S.D. Iowa 1997), with the present action is DENIED as MOOT.

V. CONCLUSION

For the reasons outlined above, Dico's motion for evidentiary hearing is DENIED. The United States' motion to enter consent decree is GRANTED. Dico's motion to consolidate is DENIED as MOOT. The Clerk of Court is directed to enter the consent decree as proposed by the original parties.

Dated this 29th day of September, 2000.

s/ Ronald E. Longstaff
RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION DATED AND FILED MARCH 13, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

CIVIL NO. 4-97-10130

DICO, INC.,

Plaintiff,

vs.

AMOCO OIL CO., *et al.*,

Defendant.

ORDER

THE COURT HAS BEFORE IT the combined defendants' motion for summary judgment, filed April 16, 2001. Plaintiff Dico, Inc. ("Dico") resisted the motion on May 29, 2001 and defendants filed a reply on June 8, 2001. The Court held a telephonic hearing on February 28, 2002. The motion is fully submitted.

I. BACKGROUND

A. The Des Moines TCE Site

The following facts either are not in dispute or are viewed in a light most favorable to Dico. Beginning in the 1950s,

affiliates of the present Dico operated various businesses on a multi-acre tract of land known locally as 200 S.W. 16th Street, Des Moines, Iowa (the "Site"). Included among the operations were metal manufacturing and the resale of chemicals and dairy equipment. In addition, an entity known as Dico Company, Ltd. operated a pesticide formulation business on the Site from 1952 until 1962.

In 1962, Dico Company, Ltd. transferred its pesticide formulation operation to Di-Chem, Inc., which continued to operate the formulation business at the site until 1970-71. The Site was owned during much of this time period by DIC Corporation.

Meanwhile, in February 1967, Dico Company, Ltd. converted from a limited partnership to a corporation known as Dico Company, Inc. Dico Company, Inc. acquired title to the Site from Dico Corporation (previously "DIC Corporation") on January 3, 1969. The entity known as "Dico," the plaintiff in the present action, admits that it is the corporate successor to Dico Company, Inc., and the current owner of the Site.

In 1974, trichloroethylene ("TCE") was found in the Des Moines Water Works ("DMWW") public drinking water supply. The Environmental Protection Agency ("EPA") traced the source of the contamination to a nearby 200 acre tract of land, which included Dico's property. In 1983, the EPA placed the Des Moines TCE site on the national priority list.

The EPA initiated a remedial investigation and divided the response activities at the TCE site into four Operable Units ("OUs"), distinguished primarily by the type of contamination found and remediation proposed for the unit. Operable Unit 2

("OU-2"), one of the two operable units at issue in the present case, called for remedial action to mitigate the release of TCE and other volatile organic compounds ("VOCs") into the ground water. During the course of the OU-2 remedial investigation, portions of the TCE Site were found to be contaminated with pesticides and herbicides. The area contaminated with pesticides and herbicides was separated from the OU-2 study and designated as Operable Unit ("OU-4"). It is undisputed that OU-2 and OU-4 both involved property presently owned by Dico.

There have been three removal actions at OU-2 and OU-4. Dico conducted two of these removal actions in 1994, pursuant to two separate Unilateral Administrative Orders issued by the EPA. The third removal action was conducted pursuant to an Administrative Order on Consent by the defendants to the present action, (the "Customer Group"), all of whom were once customers of Di-Chem.

B. Present Complaint, EPA Settlement and Entry of Consent Decree

Dico filed the present three-count complaint against the Customer Group in 1997. In Count I, Dico seeks to recover all of its past response costs attributable to the investigation and clean-up of pesticide and herbicide contamination from the Customer Group under CERCLA § 107, 42 U.S.C. § 107(a). Complaint at ¶ 97. In Count II, Dico seeks contribution from defendants pursuant to CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), for "response costs, damages, or injunctive or other relief which has been or may be imposed on Dico under CERCLA." Complaint at ¶ 101.

Appendix C

In Count III, Dico seeks a declaratory judgment pursuant to CERCLA § 113(g)(2), 42 US.C. § 9613(g)(2), that defendants "are strictly, jointly, and severally liable to Dico under §§ 107(a) and 113(f)(1) of CERCLA for future response costs incurred by Dico at the Site resulting from the release or threatened release of hazardous substances at the Site." Complaint at ¶ 103.

Meanwhile, the EPA signed a Record of Decision regarding OU-2 and OU-4 in 1996, which affirmed the clean-up work conducted under the three removal actions and determined that the only remaining response actions for the Site are long-term Operations and Maintenance ("O&M") of the removals, and institutional controls to ensure the property is not used for residential purposes.

Shortly thereafter, the Customer Group entered into negotiations with the United States for the OU-2 and and OU-4 costs. In April 1998, the EPA issued a Special Notice Letter to Dico and the Customer Group, informing them of their potential liability for the OU-2 and OU-4 costs. A proposed Consent Decree accompanied the letter. The proposed Consent Decree indicated that defendants who reached a settlement with the EPA would be protected from liability in the contribution action filed by Dico. Dico did not respond to the Special Notice Letter, and did not participate in the ensuing settlement negotiations.[1]

---

1. Dico claims it did not respond to the Special Notice Letter because: 1) the EPA had already forced Dico to incur 90 percent of the clean-up costs, and thus, the EPA had no legitimate claims remaining against Dico for which settlement could be negotiated; and 2) Dico had no reason to negotiate a settlement agreement outside of its pending contribution claim, because the only purpose for such negotiations would be to "bargain away Dico's contribution rights." Dico's arguments were rejected both by this Court and the Eighth Circuit in the related litigation.

Appendix C

On November 29, 1999, the United States filed an action in this Court against the Customer Group, simultaneously lodging the Consent Decree. The Court subsequently allowed Dico to intervene in the action.

On March 10, 2000, following the statutory notice and comment period, the United States formally moved to enter the Consent Decree. Dico moved for an evidentiary hearing, arguing such a hearing was necessary to ensure the record was fair and complete. Dico also claimed it had a vested property interest in its contribution action against the Customer Group, which could not be "taken" without due process and just compensation.

In an Order entered September 29, 2000, this Court denied Dico's motion for an evidentiary hearing, thereby rejecting its constitutional argument, and entered the Consent Decree. The Eighth Circuit affirmed this Order on January 24, 2002. *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1017 (8th Cir. 2002).

In their present motion for summary judgment, defendants argue that as a potentially responsible party ("PRP") under CERCLA § 107(a)(1), Dico may not seek direct recovery of its past or future response costs under CERCLA § 107(a)(4)(B) or impose joint and several liability on any other party. Defendants further argue that although a PRP generally may seek contribution from other PRPs under CERCLA § 113(f)(1), Dico's ability to do so was foreclosed by the entry of the Consent Decree. Accordingly, the Customer Group claims summary judgment is warranted on all three counts of the complaint.

Appendix C

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Whether Dico Has Standing Under CERCLA § 107(a)

In Count I of its Complaint, Dico seeks to recover from the Customer Group all of the past response costs attributable to pesticide contamination pursuant to CERCLA § 107(a). Count III requests a declaratory judgment that defendants "are strictly, jointly, and severally liable to Dico under §§ 107(a) and 113(f)(1) of CERCLA for future response costs incurred by Dico at the Site resulting from the release or

threatened release of hazardous substances at the Site." Complaint at ¶ 103. As noted by defendants, a declaratory judgment regarding future response costs is available under CERCLA only in a direct cost recovery action under CERCLA § (107)(a). *See, e.g., Raytheon Co. v. McGraw Edison Co., Inc.*, 989 F. Supp. 858, 865 n.8 (E.D. Wis. 1997). It follows that if, by virtue of its PRP status, Dico lacks standing to bring an action for direct recovery of its response costs under Count I, it also lacks standing to seek a declaratory judgment regarding future costs under Count III. The Court therefore will address Counts I and III simultaneously.

Although the Eighth Circuit has yet to rule on whether a PRP may maintain a § 107(a) cost recovery action against another PRP, all other circuits have determined that a PRP seeking contribution from other PRPs is limited to a § 113(f) action for contribution. *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423 (2d Cir. 1998); *Centerior Svc. Co. v. Acme Scrap Iron*, 153 F.3d 344, 356 (6th Cir. 1998); *Pnuemo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1496 (11th Cir. 1996). *United States v. Colorado & E.R.R. Co.*, 50 F.3d 1530, 1539 (10th Cir. 1995); *United Tech v. Browning-Ferris Indus.*, 33 F.3d 96, 98-103 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764-65 (7th Cir. 1994); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989). Dico does not dispute that as current owner of the Site, it qualifies as a PRP under the statute. *See* 42 U.S.C. § 9607(a)(1).

Admittedly, in each of the above-cited cases, it was clear the plaintiff PRP had contributed to the contamination in some manner, or was liable under a consent decree for site cleanup. See *Wolf, Inc. v. L & W. Service Center, Inc.*, No. 4:CV96-3099, 1997 WL 141685 at *6 (D. Neb. Mar. 27, 1997). In *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1236-3742 (7th Cir 1997), the Seventh Circuit was faced with a § 107(a) suit brought by an owner-PRP that had not been subjected to an administrative clean-up order, had not been party to a § 106 or § 107(a) action, and claimed it had purchased the contaminated site without knowledge of prior disposals and without contributing to the contamination in any way. The court noted that although claims by one PRP against other PRPs generally must be brought as contribution claims under § 113(f), its earlier decision in *Akzo Coatings, Inc.* had carved out an exception for landowners "who allege that they did not pollute the site in *any way.*" *Id.* at 1240-41 (citing *Akzo*, 30 F.3d at 764) (emphasis added). Because the *Rumpke* plaintiff appeared to qualify under this exception, alleging it was not responsible for any of the waste at the site, the court allowed its § 107(a) action to proceed. *Id.* at 1240-41. As reasoned by the court:

> [O]ne of two outcomes would follow from a landowner suit under § 107(a): either the facts would establish that the landowner was truly blameless, in which case the other PRPs would be entitled to bring a suit under § 113(f) within three years of the judgment to establish their liability among themselves, or the facts would show that the landowner was also partially

> responsible, in which case it would not be entitled to recover under its § 107(a) theory and only the § 113(f) claim would go forward.

Id. at 1240. Two federal district courts within this circuit have reached similar conclusions. *See Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 631 (E.D. Mo. 1996) (PRP who entered consent decree with state and had not been formally adjudicated liable not prohibited from bringing a § 107(a) claim); *Wolf* 1997 WL 141685 at * 7 (relying on *Rumpke*, concluded that plaintiffs who alleged they did not contribute to contamination, and were not the subject of administrative clean-up order or civil actions under CERCLA §§ 106 or 107 could continue with § 107(a) claim).

In resisting the present motion, Dico understandably attempts to align itself with *Rumpke, Laidlaw* and *Wolf.* Although this Court agrees with the *Rumpke* reasoning in theory, and is confident the Eighth Circuit would follow a similar analysis, the facts in the present case prevent Dico from claiming "innocent party" status as a matter of law. First, no matter how complex the Site's operational history may seem, Dico admits that a direct predecessor, Dico Company, Inc., owned the Site for at least one year (1969) during which the agricultural chemical formulation business was in operation. *Compare Rumpke*, 107 F.3d at 1241-42 (PRP allegedly acquired ownership of site without knowledge of environmental hazards); but *see Soo Line R. Co. v. Tang Indus., Inc.*, 998 F. Supp. 889, (N.D. Ill. 1998) (issue of fact as to whether landowner knew tenants were disposing of hazardous substances on its property).

In addition, unlike the plaintiffs in *Rumpke* or *Wolf*, Dico's clean-up efforts on the Site were prompted by two separate Unilateral Administrative Orders issued by the EPA. *Rumpke*, 107 F.3d at 1239; *Wolf*, 1997 WL 141685 at *8 (court noted in both cases that plaintiff not subject to administrative order). This is not a case where permitting a § 107(a) claim "comports with CERCLA's goal of encouraging parties to initiate cleanup operations promptly and voluntarily." *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 225 (E.D. Pa. 1995) (court allowed property owners to pursue § 107(a) claim where plaintiffs had cleaned-up property voluntarily, and none of the parties involved had been subject to judgment, consent decree or other agreement involving liability).

Finally, and most importantly, Dico has been found in this Court to have contributed at least in part to the overall contamination at the Site, and to OU-2 in particular, by enabling TCE to escape a degreasing vat and contaminate the soil and groundwater. *See United States v. Dico, Inc.*, No. 4-95-CV-10289 (S.D. Iowa), slip op. at 2-3, *aff'd, United States v. Dico*, 266 F.3d 864 (8th Cir. 2001).[2] It therefore cannot fit into the *Akzo/Rumpke* exception for "landowners who allege that they did not pollute the Site in any way." *Rumpke*, 107 F.3d at 1240; *see also Laidlaw*, 925 F. Supp. at 630

2. On April 16, 2001, defendants filed a request for judicial notice of certain "adjudicative facts" in support of their motion for summary judgment. Defendants' request is granted. *See* FED. R. EVID. 201(d) (requiring a court to take judicial notice of certain adjudicative facts "if requested by a party and supplied with the necessary information"); *see also United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (defining "adjudicative facts" for purposes of Rule 201 to include court files).

(addressing whether PRP "which has not formally admitted liability or been formally adjudicated liable is limited to a contribution action under § 113").

Although this Court's prior adjudication did not involve pesticide contamination, the Court agrees with defendants that Congress did not intend a PRP clearly responsible for at least one contaminant to ignore that liability in subsequent § 107(a) litigation simply by focusing on different contaminants. *See Rumpke*, 107 F.3d at 1240 (when party who has "injured the property" seeks recovery from another PRP, "the statute directs [it] to § 113(f) *and only to § 113(f).*") (emphasis added). Summary judgment is therefore granted on Counts I and III of Dico's Complaint.

C. Whether Contribution Bar In Consent Decree Bars Claim For Contribution

Alternatively, Count II of Dico's Complaint seeks contribution from defendants for the remediation costs at issue under CERCLA § 113, 42 U.S.C. § 9613(f)(1). As noted by defendants in their present motion, however, Dico's § 113 action is effectively barred by Paragraph 22 of the Consent Decree. This paragraph provides:

> The parties agree, and by entering this Consent Decree the Court finds, that the Settling Defendants are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for "matters addressed" in this Consent Decree. "Matters addressed" are past

> response costs and future response costs in connection with Operable Units No. 2 and 4 whether incurred by the United States or any other person.

Defendants' Appendix in Support of Motion for Summary Judgment, ("Defendants' App.") at 478.[3]

Dico has not produced evidence suggesting there is a material issue of fact regarding this issue. It does not dispute the intended legal effect of paragraph 22, nor does it dispute that it had notice of the presence of the contribution bar in the Consent Decree as early as April 1998. Rather, Dico's sole argument in resisting summary judgment on this count is that the Consent Decree, and presumably, 42 U.S.C. § 9613(f)(2), is unfair and unconstitutional. Accordingly, Dico previously had urged this Court to stay its ruling in this case pending the outcome of the Eighth Circuit appeal.

As set forth above, on January 24, 2002, the Eighth Circuit affirmed this Court's entry of the Consent Decree. *United States v. BP Amoco Oil PLC*, 277 F.3d 1012 (8th Cir. 2002). Writing for the panel, Judge McMillian expressly rejected Dico's constitutional argument, agreeing with this Court that

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3. 42 U.S.C. § 9613(f)(2) provides:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

because Dico did not have a right to contribution at the time the government sought entry of the decree, Dico never had a vested property interest that could be "taken" in violation of the Fifth Amendment. *Id.* at 1017. Absent a genuine issue of material fact as to whether entry of the Consent Decree served as an absolute bar to Dico's claim for contribution under § 113, or any other issue challenging the validity of paragraph 22 of the Consent Decree, Count II of Dico's Complaint is appropriately dismissed.

III. CONCLUSION

For the reasons outlined above, defendants' April 16, 2001 motion for summary judgment [Clerk No. 119] is granted on all counts. Defendants' April 16, 2001 request for judicial notice [Clerk No. 124] is granted. The Clerk of Court is directed to enter judgment in favor of defendants and against Dico, Inc.

IT IS SO ORDERED.

Dated this 13th day of March, 2002.

s/ Ronald E. Longstaff
RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JUDGMENT IN CIVIL CASE
CASE NO.: 4:97-CV-10130

DICO, INC.,

Plaintiff

v

AMOCO OIL CO., et al.,

Defendant

_____ **JURY VERDICT.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **DECISION BY COURT.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Defendants' 4/16/01 motion for summary judgment is granted on all counts. Defendants' 4/16/01 request for judicial notice is granted. Judgment is entered in favor of defendants and against Dico, Inc.

MAR 13, 2002
Date

s/ [illegible]
Clerk

s/ [illegible]
(By) Deputy Clerk

APPENDIX D — CONSENT DECREE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL ACTION NO. _____

UNITED STATES OF AMERICA

Plaintiff,

v.

BP AMOCO OIL PLC,
CHEVRON CHEMICAL COMPANY,
BAYER CORPORATION,
MONSANTO COMPANY, AND
SHELL OIL COMPANY,

Defendants.

CONSENT DECREE

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I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") of 1980, 42 U.S.C. §§ 9606, 9607, as amended.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred and to be incurred by the United States for response actions taken in connection with Operable Units No. 2 and 4 ("OU2" and "OU4") of the Des Moines TCE Superfund Site in Des Moines, Iowa ("Site"), together with accrued interest; and (2) performance of studies and response work by the Settling Defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Iowa (the "State") on April 23, 1998 of negotiations

with potentially responsible parties and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior (DOI) on April 23, 1998 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree.

E. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiff or to any other person arising out of the transactions or occurrences alleged in the complaint, nor do they acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658.

G. Due to Site complexities, EPA divided response activities for the Site into separate administrative operable units. Operable Units No. 2 and 4 concern the risks associated with hazardous substance contamination on the surface and in subsurface soils on select portions of the Site.

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H. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, a series of studies and reports were performed for Operable Units No. 2 and 4 of the Site.

I. The Remedial Investigation ("RI") Report for Operable Unit No. 2 was completed on February 2, 1993. The RI Report for Operable Unit No. 4 was completed on July 27, 1995. A Feasibility Study ("FS") Report addressing both OU2 and OU4 ("OU2/OU4 FS") was completed on May 30, 1996.

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the OU2/OU4 FS and of the proposed plan for remedial action on June 3, 1996, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

K. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision for OU2 and OU4 ("OU2/OU4 ROD"), executed on December 13, 1996, on which the State has given its general agreement. The OU2/OU4 ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

L. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this judicial district. Settling Defendants consent to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. The obligations of the Settling Defendants to comply with Sections X (Access to Information) and XI (Retention of Records) shall be several. The obligations of the Settling Defendants to pay amounts owed under this Consent Decree and to comply with all other obligations under this Consent Decree aside from those set forth in Sections X (Access to Information) and XI (Retention of Records) shall be joint and several.

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*

"Consent Decree" shall mean this agreement and all appendices attached hereto (listed in Section XVI (Appendices)). In the event of conflict between this agreement and any appendix, this agreement shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last

day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

"DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

"IDNR" shall mean the Iowa Department of Natural Resources and any successor departments or agencies of the State.

"Future Response Costs" shall mean all response costs, including, but not limited to, direct and indirect costs, incurred or to be incurred by the United States or by any other person in connection with Operable Units No. 2 and 4 of the Site after September 30, 1999, plus Interest on all such costs.

"Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

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"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or a lower case letter.

"Parties" shall mean the United States and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, incurred by the United States or by any other person in connection with Operable Units No. 2 and 4 of the Site through September 30, 1999, plus Interest on all such costs.

"Plaintiff" shall mean the United States.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "OU2/OU4 ROD" shall mean the EPA Record of Decision for Operable Units No. 2 and 4 of the Site signed on December 13, 1996, by the Regional Administrator, EPA Region VII, or his/her delegate, and all attachments thereto.

"Section" shall mean a portion of this Consent Decree identified by a roman numeral.

"Settling Defendants" shall mean: (1) BP Amoco PLC, including its predecessors BP Amoco Corporation, BP Amoco Company, Amoco Oil Company, American Oil Company, and Standard Oil Company; (2) Chevron Chemical Company; (3) Bayer Corporation and its predecessors Chemagro Company, Baychem Corporation, Mobay Corporation and Miles Inc.; (4) Monsanto Company and its predecessor Monsanto Chemical Company; and (5) Shell Oil Company and Shell Chemical Company.

"Site" shall mean the Des Moines TCE Superfund site listed on the National Priorities List, encompassing approximately 200 acres of land, located southwest of downtown Des Moines, Polk County, Iowa and depicted generally on the map attached as Appendix A.

"State" shall mean the State of Iowa.

"United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

V. REIMBURSEMENT OF RESPONSE COSTS

5. *Reimbursement of Response Costs*. Within sixty (60) days of the effective date of this Consent Decree, Settling Defendants shall pay to the EPA Hazardous Substance Superfund $2,513,808, plus Interest from the date of the lodging of the Consent Decree with the Court to the date of payment, in reimbursement of Past Response Costs and Future Response Costs.

6. Payments shall be made by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of

Justice account in accordance with current electronic funds transfer procedures, referencing the appropriate U.S.A.O. file number, the EPA Region and Site/Spill ID #0725, and DOJ case number 90-11-3-1138A. Payments shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Southern District of Iowa following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Settling Defendants shall send notice that such payments have been made to the United States as specified in Section XIII (Notices and Submissions).

7. *Creation of Special Account.* Of the payments made by the Settling Defendants pursuant to this Section to the EPA Hazardous Substance Superfund, $1,296,906, plus Interest accrued from the date of the lodging of the Consent Decree on that amount shall be deposited directly into the general EPA Hazardous Substance Superfund for reimbursement of EPA's past costs and estimated future costs of overseeing performance of the response action selected in the OU2/OU4 ROD. The remaining $1,216,902 plus Interest accrued from the date of the lodging of the Consent Decree on that amount shall be deposited in the Des Moines TCE Superfund Site, Operable Units No. 2 and 4 Special Account within the EPA Hazardous Substance Superfund. Special Account funds shall be retained for a period of two years from the effective date of this Consent Decree or such other time period specified in any express written administrative agreement with EPA or consent decree with the United States as provided below. These funds are

for use to conduct or finance future response actions in connection with operable Units No. 2 and 4. These Special Account funds shall be available for use by any person who conducts response actions in connection with Operable Units No. 2 and 4 under an express written administrative agreement with EPA or consent decree with the United States. Any Special Account balance which has not been allocated to response actions in connection with Operable Units No. 2 and 4 within two years from the effective date of this Consent Decree or as provided in an express written agreement with EPA or consent decree with the United States shall be transferred to the general EPA Hazardous Substance Superfund. Notwithstanding any other provisions contained in this Paragraph, any Special Account balance remaining in the Special Account after completion of all response action in connection with Operable Units No. 2 and 4 shall be transferred to the general EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH REQUIREMENTS OF CONSENT DECREE

8. *Interest on Late Payments.* In the event that any payments required by the Settling Defendants under Section V (Reimbursement of Response Costs) are not made when due, Interest shall accrue on the unpaid balance through the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Settling Defendants' failure to make timely payments under this Section. The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 10.

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9. *Stipulated Penalties for Late Payments.* If any amounts due to EPA under this Consent Decree under Section V (Reimbursement of Response Costs) are not paid in full when due, Settling Defendants shall be liable for and shall pay stipulated penalties as follows until payment in full is made:

Stipulated Penalty Per Day	**Days Late**
$1,500/day	Days 1 through 30
$3,000/day	Days 30 and greater

This stipulated penalty is in addition to the unpaid balance due and any Interest accrued thereon.

10. Stipulated penalties shall accrue as provided in this Section regardless of whether EPA has made a demand for payment, but need only be paid upon demand. All stipulated penalties shall begin to accrue on the day after complete payment is due, and shall continue to accrue through the day payment is received by EPA. Nothing herein shall preclude the simultaneous accrual of separate stipulated penalties for separate violations of this Consent Decree. Stipulated penalties are due and payable within 30 days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties. All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," and shall be sent to:

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Mellon Bank, EPA Region VII
Superfund
Financial Management Section
Post Office Box 360748M
Pittsburgh, PA 15251

The transmittal letter shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #0725, the DOJ Case Number 90-11-3-1138A, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XIII (Notices and Submissions).

11. If Settling Defendants fail to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as Interest. If the United States brings an action to enforce this Consent Decree, the Settling Defendants shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

12. Stipulated penalties are not the exclusive civil remedy of the United States for violations of this Consent Decree. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(1) of CERCLA.

13. Payments made under this Section shall not be tax deductible for federal tax purposes. Notwithstanding any

other provision of this Section, the United States may, in its nonreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

VII. COVENANT NOT TO SUE BY PLAINTIFF

14. *Covenant Not to Sue by the United States.* Except as specifically provided in Paragraph 15 (General Reservation of Rights), and Paragraph 16 (Reservation of Rights for Unknown Conditions), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107 (a) of CERCLA to compel them to undertake response actions or to recover Past Response Costs or Future Response Costs in connection with Operable Units No. 2 and 4 of the Site. This covenant not to sue shall take effect upon the receipt by EPA of all payments required by Section V (Reimbursement of Response Costs) Paragraph 5, and, if applicable, Section VI (Failure to Comply with Requirements of Consent Decree) Paragraphs 8 and 9. This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to the Settling Defendants and does not extend to any other person.

15. *General Reservations of Rights.* The covenant not to sue set forth above does not pertain to any matters other than those expressly specified in Paragraph 14. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including but not limited to, the following:

a. liability for response actions and response costs incurred or to be incurred in connection with Operable Units at the Site other than Operable Units No. 2 and 4;

b. claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;

c. liability arising from the past, present, or future disposal, release, or threat of release of a hazardous substance outside of the Site;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

16. *Reservation of Rights for Unknown Conditions.* Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants (1) to perform further response actions in connection with Operable Units No. 2 and 4 of the Site or (2) to reimburse the United States for additional costs of response in connection with Operable Units No. 2 and 4 if (i) conditions at the Site, previously unknown to EPA, are discovered, or (ii) information, previously unknown to EPA, is received, in whole or in part, after the lodging of this Consent Decree, and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action selected for Operable Units No. 2 and 4 is not protective of human health or the environment.

17. For purposes of Paragraph 16, the information and the conditions known to EPA shall include only that information and those conditions set forth in the OU2/OU4 ROD for the Site and the administrative record supporting the OU2/OU4 ROD and any testing performed in connection with OU2/OU4 with EPA's advanced knowledge and consent between the date upon which the OU2/OU4 ROD was issued and the date of lodging of this Consent Decree.

18. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

VIII. COVENANT BY SETTLING DEFENDANTS

19. *Covenant Not to Sue.* Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States in connection with Operable Units No. 2 and 4 of the Site or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b) (2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 in connection with Operable Units No. 2 and 4 of the Site, and

c. any claims arising out of response activities, including claims based on EPA's selection of response actions, oversight of response activities or approval of plans for such activities.

20. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d)

IX. EFFECT OF SETTLEMENT/ CONTRIBUTION PROTECTION

21. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Except as provided in Paragraph 26, each of the Parties expressly reserves any and all rights, defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

22. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for "matters addressed" in this Consent Decree. "Matters addressed" are Past Response Costs and Future Response Costs in connection with Operable Units No. 2 and 4 incurred by the United States.

23. The Settling Defendants agree that with respect to any suit or claim brought by them after the date of the lodging of this Consent Decree for matters related to this Consent Decree they will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

24. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them after the date of lodging of this Consent Decree for matters related to this Consent Decree they will notify in writing the United States within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States, within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

25. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in Section VII (Covenant Not to Sue by Plaintiff).

26. Each Settling Defendant agrees to waive all contribution rights of action that they may have pursuant to 42 U.S.C. § 9613(f) for the "matters addressed" in this Consent Decree against any person.

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X. ACCESS TO INFORMATION

27. Settling Defendants shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to response actions performed at the Site. Settling Defendants shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of response actions at the Site.

28. *Confidential Business Information*. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

29. *Privileged Information.* The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants.

30. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XI. RETENTION OF RECORDS

31. Until 10 years after the effective date of this Consent Decree, each Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of response actions or the liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

32. At the conclusion of this document retention period, Settling Defendants shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendants shall deliver any such records or documents to EPA. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law in accordance with the provisions of Section X (Access to Information). If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendants shall retain all records and documents that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor.

XII. CERTIFICATIONS

33. By signing this Consent Decree, each Settling Defendant certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

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XIII. NOTICES AND SUBMISSIONS

34. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and the Settling Defendants, respectively.

As to the United States:

As to the U.S. Department of Justice:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DJ # 90-11-3-1138A

As to the U.S. Environmental Protection Agency:

Director, Superfund Division
United States Environmental Protection Agency
Region VII
901 N. 5th Street
Kansas City, KS 66101

and

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Mary Peterson
Remedial Project Manager
United States Environmental Protection Agency
Region VII
Iowa/Nebraska Branch
901 N. 5th Street
Kansas City, KS 66101

As to the Settling Defendants:

As to Bayer Corporation:

Mr. Warren C. Davis
Director, Regulatory and Community Governmental Affairs
Bayer Corporation
Agriculture Division
8400 Hawthorn Road
Kansas City, MO 64120

William G. Ferguson, Esq.
Vice President and Assistant General Counsel
Bayer Corporation
Agriculture Division
8400 Hawthorn Road
Kansas City, MO 64120

As to BP Amoco PLC:

John P. Bennington
BP Amoco Corp.
28100 Torch Parkway, Suite 500
Warrenville, IL 60555-4015

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Janice M. McLain
BP Amoco Corp
200 East Randolph Drive
MC 2102A
Chicago, IL 60601-7125

As to Chevron Chemical Company:

Daniel E. Vineyard
Senior Counsel
Law Department
The Chevron Companies
1301 McKinney Street, Suite 2204
Houston, TX 77010-3029

As to Monsanto Company:

Judy Reinsdorf
Monsanto Company
EING,
800 N. Lindbergh Boulevard
St. Louis, MO 63167

As to Shell Oil Company:

K.W. Rogers
Shell Oil Company
P.O. Box 2463
Houston, TX 77252

Danna Walton, Esq.
Shell Oil Company
P.O. Box 2463
Houston, TX 77252

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XIV. EFFECTIVE DATE

35. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XV. RETENTION OF JURISDICTION

36. This Court shall retain jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms.

XVI. APPENDICES

37. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is a map of the Des Moines TCE Superfund Site.

XVII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

38. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of

CERCLA, 42 U.S.C. § 9622 (d) (2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

39. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVIII. SIGNATORIES/SERVICE

40. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

41. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

42. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or

relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS _____DAY OF _____, 19__.

_____
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. BP Amoco PLC, et al.*, relating to the Des Moines TCE Superfund Site Operable Units No. 2 and 4.

Date: 11/17/99

FOR THE UNITED STATES OF AMERICA
s/ Lois J. Schiffer
Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

s/ [illegible]
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

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Don C. Nickerson
United States Attorney
Southern District of Iowa

s/ [illegible]
Assistant United States Attorney
Southern District of Iowa
U.S. Department of Justice
U.S. Courthouse Annex, 2nd Fl.
110 East Court
Des Moines, Iowa 50309

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. BP Amoco PLC et al.*, relating to the Des Moines TCE Superfund Site Operable Units No. 2 and 4.

s/ Diane K. Callier
[for] Dennis Grams, P.E.
Regional Administrator, Region VII
U.S. Environmental Protection Agency
726 Minnesota Avenue
Kansas City, KS 66202

s/ Daniel J. Shiel
Daniel J. Shiel
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, KS 66202

Appendix D

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. BP Amoco PLC et al.*, relating to the Des Moines TCE Superfund Site Operable Units No. 2 and 4.

FOR BP AMOCO PLC

Date: Oct. 6, 1999 s/ Janice M. McLain
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Appendix D

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. BP Amoco PLC et al.*, relating to the Des Moines TCE Superfund Site Operable Unites No. 2 and 4.

FOR CHEVRON CHEMICAL COMPANY LLC,
FORMERLY KNOWN AS CHEVRON
CHEMICAL COMPANY

Date: October 6, 1999

s/ Cathy S. Robie
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Staff Environmental Manger
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Appendix D

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States vs. BP Amoco PLC et al.*, relating to the Des Moines TCE Superfund Site Operable Units No. 2 and 4.

FOR BAYER CORPORATION

DATE: October 4, 1999

s/ William G. Ferguson
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Appendix D

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. BP Amoco PLC et al.*, relating to the Des Moines TCE Superfund Site Operable Units No. 2 and 4.

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Date: 10/4/99

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Appendix D

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. BP Amoco PLC et al.*, relating to the Des Moines TCE Superfund Site Operable Units No. 2 and 4.

FOR SHELL OIL COMPANY

Date: 10-3-99

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APPENDIX E — RELEVANT STATUTES

42 U.S.C. § 9613

* * *

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

* * *

Appendix E

(g) Period in which action may be brought

* * *

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after —

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

* * * *

Appendix E

42 U.S.C. § 9657. Separability of provisions; contribution

If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby. If an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contribution shall be treated as having no force and effect.

(Pub.L. 96-510, Title III, § 308, Dec. 11, 1980, 94 Stat. 2811; Pub.L. 99-499, Title I, § 122(b), Oct. 17, 1986, 100 Stat. 1688.)

Supreme Court U.S.
FILED
MAY 30 2002
OFFICE OF THE CLERK

No. 01-1607

IN THE

Supreme Court of the United States

DICO, INC,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT CUSTOMER GROUP'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") empowers the United States Environmental Protection Agency ("EPA") to respond to releases or threatened releases of hazardous substances, to recover its response costs from defined classes of liable parties, and to order parties to perform response activities. *See*, 42 U.S.C. §§ 9604(a)(1), 9606(a), 9607(a)(4)(A). CERCLA authorizes any person to seek contribution from any other person who is liable for certain response costs, subject to the limitation that a person who has resolved its liability to the United States shall not be liable for claims for contribution regarding matters addressed in the settlement. 42 U.S.C. 9613(f)(1), (2).

In this case, EPA negotiated a Consent Decree resolving the government's CERCLA claims against five parties for the costs of cleaning up a contaminated site. The Consent Decree gives the settling parties protection from contribution claims for matters addressed in the Consent Decree. Petitioner, Dico, Inc. ("Dico"), who is the owner and operator of most of the site, and who boycotted the settlement negotiations, had contribution claims pending against the settling parties.

The questions presented are:

(1) Whether Dico had a vested property right in its CERCLA contribution action against the settling parties even though no final judgment was ever rendered in the matter.

(2) In the event Dico had a vested property right in that action, whether the District Court's approval of a Consent Decree that provided for contribution protection to the settling parties and extinguished Dico's contribution action constituted a taking without just compensation under the Fifth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Dico, Inc. is the petitioner and was an intervenor before the District Court and the Eighth Circuit Court of Appeals.

The United States of America is a respondent and was a plaintiff before the District Court and the Eighth Circuit Court of Appeals.

BP Products North America, Inc., Chevron Chemical Company, Bayer Corporation, Pharmacia Corporation and Shell Oil Company (collectively, the "Customer Group") are respondents and were defendants before the District Court and the Eighth Circuit Court of Appeals.

Respondent BP Products North America, Inc. is wholly-owned by BP Company North America, Inc. and Standard Oil Company.

Chevron Chemical Company is an unincorporated division of Chevron U.S.A., Inc.

Bayer Corporation is owned by Bayer A.G.

Pharmacia Corporation has no parent corporation and no publicly held company owns 10% or more of Pharmacia Corporation's stock.

Shell Oil Company is wholly-owned by Royal Dutch Petroleum Company and "Shell" Transport and Trading Company, P.L.C.

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STATUTORY PROVISIONS INVOLVED

The provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657, relevant to this petition are reprinted in the Appendix at A-1 – A-5.

STATEMENT OF THE CASE

Respondents (the "Customer Group") are five companies who, after extensive negotiations with the United States Environmental Protection Agency ("EPA"), settled their alleged arranger liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., for contamination resulting from agricultural chemical formulation activities at the Des Moines TCE Site ("Site"). Petitioner, Dico, Inc. ("Dico"), the current and former owner and operator of the Site,[1] refused to participate in the settlement negotiations, and challenges the District Court's and the Eighth Circuit Court of Appeals's approval of the Consent Decree.

This matter began in the mid-1970s, when EPA learned of the presence of the hazardous substance trichloroethylene in the drinking water supply in Des Moines, Iowa. (Pet. App. 3a, 19.) The EPA determined Dico was the main source of this contamination. In 1989, other contaminants, including pesticides and herbicides, were discovered at and near Dico's property. Upon learning of the pesticide contamination, EPA divided the Site into four operable units ("OU"). Significantly, OU2 included the characterization of sources related to groundwater contamination and OU4 included the cleanup of pesticide and herbicide contamination in the soils and

---

[1] Dico misleads the Court, claiming that it owned the property only for a "few months" during the operation of the formulating facility at the Site. (Petition for a Writ of Certiorari ("Petition") 19). Both the District Court and the Eighth Circuit determined that Dico's ownership goes back as far as 1941 or 1942, and Dico's predecessor, Di-Chem, operated the chemical formulation business at the Site until the early 1970s. (Petitioner's Appendix, ("Pet. App.") 3a, 20a, 31a n.6.)

buildings. (Pet. App. 20a.) OUs 1 and 3 involved Dico's contamination of the groundwater, and did not involve pesticides and herbicides.

Pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, EPA issued two unilateral administrative orders ("UAOs") (Pet. App. 3a, 20a, 41a), compelling Dico to perform two OU2/4 removal actions at the Site. Later, EPA negotiated an administrative order on consent ("AOC") with the Customer Group, which allegedly had sent raw technical grade product to the Site to be formulated into pesticides and herbicides. Under the AOC, the Customer Group agreed to perform another removal action relating to OU2/4. (Pet. App. 3a, 4a, 20a, 41a.) In addition to these activities, EPA performed a remedial investigation and feasibility study ("RI/FS") for OU2/4, oversaw the RI/FS and the work performed by Dico and the Customer Group, and evaluated the final remedy for OU2/4. As a result, EPA determined that long term operation and maintenance of the final remedy would need to be performed over the next thirty years. The total cost of performing cleanup activities at the Site was estimated by EPA to be about $8,605,620.

In 1997 Dico filed a lawsuit against the Customer Group, seeking joint and several cost recovery under CERCLA section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), contribution pursuant to CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1), and a declaratory judgment under CERCLA section 113(g)(2), 42 U.S.C. § 9613(g)(2). (Pet. App. 41a-42a.) The Customer Group counterclaimed, seeking contribution from Dico for costs spent by the Customer Group in connection with the Site.

In 1998, EPA sent a Special Notice Letter to Dico and the Customer Group. (Pet. App. 4a, 21a, 42a.) At the time, EPA had significant unreimbursed costs relating to the work it performed at the Site for OU2/4. Additionally, no one had agreed to perform or fund the future operation

and maintenance at the Site. The Special Notice was accompanied by a Non-Binding Preliminary Allocation of Responsibility ("NBAR"), which is EPA's division of responsibility among the parties and is developed by EPA pursuant to CERCLA section 122(e)(3), 42 U.S.C. § 9622(e)(3).[2] (Pet. App. 4a, 21a.) The NBAR, which was based on numerous factors frequently considered by courts when performing an allocation under CERCLA, assigned the Customer Group a 39 percent fair share of liability for cleanup of the OU2/4 pesticide/herbicide contamination at the Site and Dico a 61 percent fair share. (*See* Pet. App. 7a, 21a.)

In response to the Special Notice Letter, the Customer Group submitted a good faith settlement offer to EPA and entered into settlement negotiations to resolve its entire liability for OU2/4 contamination at the Site. Despite at least three different direct invitations to participate in these negotiations, Dico declined to negotiate with EPA and refused to attend a single settlement session. (Pet. App. 21a-22a, 24a.) Instead, Dico informed EPA and the Customer Group that it would participate only if the settlement would also resolve its liability for OU1/3.[3] Because the Customer Group was implicated only with regard to OU2/4, and had no involvement whatsoever with OU1/3, Dico was informed by EPA that such a settlement was not being negotiated. In November 1999, EPA and the Customer Group entered into a Consent Decree. (*See* Pet. App. 53a-86a.) Meanwhile, in Dico's contribution action,

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[2] NBARs are used to expedite settlements. *See* 42 U.S.C. § 9622(e)(3)(A).

[3] As noted in Dico's Petition, EPA and Dico were in a dispute regarding EPA's ability to recover oversight costs for overseeing Dico's OU1/3 work. This issue was resolved in favor of the EPA in *United States v. Dico*, 266 F.3d 864, 880 (8th Cir. 2001), *cert. denied*, 2002 WL 341293 (U.S. May 28, 2002).

contrary to Dico's assertions (Petition, 3 n.2), Dico had not established a *prima facie* case for liability against the Customer Group, which vigorously defended the action. Instead, the *prima facie* elements of (1) whether the Customer Group members were "covered persons" under CERCLA section 107(a), 42 U.S.C. § 9607(a), as arrangers, (2) whether Dico's costs had been incurred consistent with the National Contingency Plan, and (3) whether Dico paid more than its fair share of recoverable costs, had yet to be determined by the District Court.

Under the terms of the Consent Decree, the Customer Group paid EPA $2,513,808 plus interest from when the Consent Decree was lodged. (Pet. App. 62a.) The figure paid by the Customer Group represented its 39 percent fair share of the *total* projected costs relating to the OU2/4 pesticide/herbicide contamination less costs already paid by the Customer Group in performing its removal action. It also included a settlement premium of $157,662 above the Customer Group's fair share to account for uncertainties associated with EPA's projections for future costs.[4] Of the money paid by the Customer Group, a portion of the costs went to EPA as reimbursement for its past costs. The rest of the money went into the Des Moines TCE Superfund Site OU2 and OU4 Special Account. These funds were, and are, to be made available to anyone who conducts a response action in connection with OU2/4 under an administrative agreement with EPA or pursuant to a written consent decree with the United States. After two years, money not already allocated is to be transferred to

---

[4] Dico claims that the Customer Group "bought their way out of Dico's contribution claim by paying $2,513,808 plus interest" to the government. (Petition 4.) Given that this substantial figure represents the Customer Group's fair share, it is hard to imagine Dico's gripe. Obviously, the Customer Group would not pay its fair share of costs for the entire Site only to remain in litigation with Dico.

the general EPA Hazardous Substance Superfund. In return for its significant expenditure and its cooperation with the government, as set forth in CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2), the Customer Group received contribution protection.

On March 10, 2000, EPA moved to enter the Consent Decree in the United States District Court, Southern District of Iowa, Central Division. Dico opposed the entry of the Consent Decree and sought an evidentiary hearing, which was denied. (Pet. App. 23a-28a.) After carefully considering all papers, including Dico's opposition and supporting documents, the District Court held that the Consent Decree was fair, reasonable, and consistent with the purposes of CERCLA, and entered the Consent Decree. (Pet. App. 28a-37a.) Specifically, the District Court determined that the Consent Decree was procedurally fair because negotiations were conducted at arms length, in an open fashion, with multiple invitations having been made to Dico to participate. Dico's repeated boycotts of all the settlement negotiations foreclosed any argument that it was treated unfairly. (Pet. App. 29a.) Also, the District Court held that the Consent Decree was substantively fair because the Customer Group's fair share of liability was based on factors frequently considered by courts when performing CERCLA allocations. (Pet. App. 30a-34a.) Finally, the District Court held that the Consent Decree was reasonable and consistent with the purposes of CERCLA because it ensured funds were available to complete the required work at the Site and allocated costs in a manner reasonably related to the actual percentages of fault. (Pet. App. 36a-37a.) The Customer Group timely paid EPA $2,513,808 plus interest.

Dico appealed the District Court's decision, claiming, *inter alia*, that the Consent Decree authorized an unconstitutional taking of its contribution claim against the Customer Group. The Eighth Circuit upheld the District

Court's approval and ruled that Dico never had a vested property right in its contribution action. (Pet. App. 9a-10a.) Dico then filed the pending Petition.

SUMMARY OF ARGUMENT

Dico argues that Congress intended to codify an unconditional common law right of contribution in CERCLA. Dico argues that its right to contribution against the Customer Group, as established by the common law, vested when EPA issued to it a Unilateral Administrative Order. Dico's arguments, which contradict the language of CERCLA, Congressional intent, and case law, are not compelling.

As initially enacted, CERCLA contained no provision expressly authorizing contribution actions among liable parties. However, numerous courts found that CERCLA provided an implied right of contribution. In 1986, Congress amended CERCLA to specifically authorize contribution actions. At the same time, Congress used its powers to limit this right of contribution by prohibiting contribution actions against anyone who entered into an administrative or judicially approved settlement with EPA. Thus, the CERCLA amendments superceded any unconditional common law right of contribution that may have existed, and control Dico's contribution rights against the Customer Group.

CERCLA does not create a vested right in Dico's contribution action. CERCLA explicitly states that the ability to seek contribution is at all times limited by the contribution protection afforded to settling parties. The legislative history of CERCLA's contribution section clearly expresses this intent: "The section also confirms a federal right of contribution or indemnification for persons alleged or held to be liable under section 106 or 107 of CERCLA *and prohibits the assertion of such rights against*

a party who has entered into a judically [sic] approved settlement with EPA." HR Rep. No. 99-253, pt. 1, 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (emphasis added). No provisions of CERCLA support a contrary conclusion.

Moreover, even if one were to look to the common law, Dico's claim against the Customer Group did not vest. As CERCLA actions are actions among joint tortfeasors, Dico's claim cannot vest until a final judgment has been rendered, something that never happened in Dico's contribution case.

Finally, the extinguishment of Dico's claim is consistent with the purposes of CERCLA. Congress drafted CERCLA and its contribution provisions to encourage parties to be more willing to assume financial responsibility for cleanup and to settle with the government. The Customer Group cooperated with the EPA, agreed to perform cleanup activities, and negotiated a Consent Decree which required the payment of the Customer Group's fair share of liability as determined by the EPA of $2,513,808. In contrast, Dico had to be ordered to perform cleanup work and refused to attend a single settlement negotiation session. That contribution protection extinguishes Dico's contribution action against the Customer Group is entirely consistent with Congress's intent.

ARGUMENT

Dico refuses to believe that the same statute that gave rise to its contribution action against the Customer Group also can extinguish such claim. Dico would like the Court to re-write CERCLA to reflect its view of how the statute should operate. However, Dico can offer no compelling reason as to why the Court should even accept its Petition, let alone override Congress's clear intent.

Indeed, the present case meets none of the characteristics set forth in Supreme Court Rule 10 ("Rule 10"). Dico cannot point to any decision of any other court that either conflicts with the Eighth Circuit's ruling or otherwise offers support for Dico. Indeed, Dico cannot even point to language in CERCLA that supports its position. Instead, Dico has attempted to craft an argument based on what Dico insists was Congress's "true" intent in enacting CERCLA and its amendments.

In its attempt to create a conflict between the Eighth Circuit's decision and *something*, Dico posits that the Eighth Circuit's opinion (1) ignores Congress's intent to codify a common law contribution right that Dico believes vests when a potentially responsible party's ("PRP") liability under CERCLA is established in an administrative or court order; (2) subverts Congressional intent to enact a statutory scheme that protects contribution rights once they vest, despite CERCLA's clear statutory checks and balances on governmental settlement authority and power, and (3) sets a national rule that undermines a PRP's incentive to focus on prompt remediation first and on remediation costs second. (Petition 8.)

As set forth below, each of Dico's arguments fails. First, it is the clear language in CERCLA, and not Dico's distorted view of Congress's intent to codify the common law, that governs Dico's action. While on the one hand CERCLA permits parties to seek contribution from other PRPs, it also unconditionally provides parties that settle with the United States contribution protection. Thus, the unambiguous language of CERCLA limits Dico's ability to have a vested property right in its contribution action, if one would ever have existed. Second, even through the application of common law, Dico does not have a vested property right. Contrary to Dico's assertions, there was never a final judgment or other fixing of Dico's claim. In fact, currently Dico could not even maintain an action

against the Customer Group because the Customer Group has already paid more than its fair share of costs to resolve its liability at the Site, making the subject of contribution moot. Finally, the outcome obtained in the present action is consistent with CERCLA's intent to encourage voluntary settlements. That the recalcitrant Dico is displeased with the outcome only supports CERCLA's scheme to encourage parties to settle (like the Customer Group did) and discourage Dico's stubborn refusal to come to the table.

I. CERCLA, WHICH GOVERNS DICO'S CLAIMS, DOES NOT CREATE A VESTED RIGHT IN DICO'S CONTRIBUTION ACTION

Dico seeks to have the Court overlook CERCLA's statutory language and instead apply the common law to its action. This effort cannot succeed. Dico's contribution action against the Customer Group is brought pursuant to Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1). However, through a scheme designed to encourage voluntary settlements, this provision is limited by the contribution protection CERCLA explicitly affords to settling parties. Moreover, the irrelevant CERCLA provisions relied upon by Dico provide no support for Dico's position.

A. CERCLA CONTROLS DICO'S CONTRIBUTION ACTION

Dico seeks to go back in time to a period when CERCLA did not contain an explicit, but limited, right to contribution. Dico asks the Court to ignore the current language of CERCLA and instead apply Dico's rendition of the common law right to contribution. However, Dico's attempt to apply laws that long ago were superceded by Congress fails. The only law that is relevant to Dico's

contribution claim is CERCLA, as amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, § 101, *et seq*.

As initially enacted, CERCLA contained no express provision to authorize a CERCLA PRP who had incurred cleanup costs to seek contribution from another PRP. *See, e.g., Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994). Despite the lack of clarity in the statute, numerous district courts interpreting CERCLA held that such a cause of action existed. *Id.* However, the authority for such holding varied among the courts. Some courts indicated the right to contribution was expressly authorized by CERCLA, others found the right to exist by implication, and still others found the authority for the right to be federal common law. *See United States v. New Castle*, 642 F. Supp. 1258, 1262 (D. Del. 1986). Further clouding the issue and raising questions regarding the availability of contribution actions under CERCLA was the United States Supreme Court's holding in *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981), which refused to imply rights of contribution actions in other statutes absent express direction from Congress. *See United Technologies v. Browning-Ferris Ind.*, 33 F.3d 96, 100 (1st Cir. 1994).

In 1986, as part of the SARA amendments, Congress tackled the issue of contribution by establishing a scheme that expressly authorizes PRPs to seek contribution from other PRPs, but also encourages settlements with the government. Congress did this primarily by adding, side by side, the following two new key provisions.

Section 113(f)(1), 42 U.S.C. § 9613(f)(1), was added to state, in part:

> Any person may seek contribution from any other person who is liable or potentially liable [under CERCLA] .... Such claims shall be brought in accordance with this

> section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Section 113(f)(2), 42 U.S.C. § 9613(f)(2), was added to state, in part:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

While section 113(f)(1), 42 U.S.C. § 9613(f)(1), cleared up the controversy regarding a party's ability to seek contribution under CERCLA, section 113(f)(2), 42 U.S.C. § 9613(f)(2), limited this ability as an incentive to encourage parties to enter into settlements with the government. As reflected in this section's legislative history:

> The section also confirms a Federal right of contribution or indemnification for persons alleged or held to be liable under section 106 or 107 of CERCLA and *prohibits the assertion of such rights against a party who has entered into a judically [sic] approved settlement with EPA.*

H.R. Rep. No. 99-253, *supra,* 1986 U.S.C.C.A.N. at 2861

(emphasis added).[5] It is the union of sections 113(f)(1) and (2) that governs Dico's contribution claim against the Customer Group and which clearly prohibits contribution actions against settling parties.

Dissatisfied with the results mandated by the statute, Dico now asks the Court to do something the Eighth Circuit refused to do: ignore the entire contribution scheme and incentives Congress explicitly inserted into the statute through the SARA amendments. Dico criticizes the Eighth Circuit, claiming its ruling erroneously and impliedly assumes that Congress created the right to contribution. (Petition 13.) Dico argues that the right to contribution was codified and clarified but was not created by Congress, since before the SARA amendments federal common law recognized an implied right of contribution. (*Id.*) In essence, it appears that Dico is asking the Court to perform an analysis not based on CERCLA, but rather on a common law right to contribution.

Dico's request finds no support in the law or in logic. Whereas Dico is asking that the Court find a vested right in the common law, any such right was superceded by Congress through the SARA amendments. *See Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established '[a] person has no property, no vested interest, in any rule of the common law.' . . . The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law' . . . ."). Thus, even if Dico did have a vested right to contribution under the common law, which, as discussed below, it did not, such right was long ago nullified by the contribution scheme created by SARA. Dico's contribution action is governed

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[5] In quoting language from this portion of the Congressional Record in support of its argument, Dico failed to cite this paragraph, which negates its position. (Petition 22-23.)

only by CERCLA, as amended by SARA in 1986. As such, Dico's contribution claim against the Customer Group was extinguished when the Customer Group settled with the government and paid its fair share of remediation costs at the Site.

B. CERCLA DOES NOT PROVIDE DICO WITH A VESTED RIGHT IN ITS CONTRIBUTION ACTION AGAINST THE CUSTOMER GROUP

The Customer Group willingly cooperated with the government, paid its fair share of costs at the Site, and entered into a judicially approved Consent Decree with the EPA. This behavior is precisely what Congress intended in drafting CERCLA and the SARA amendments. In contrast, Dico twice had to be ordered by EPA to perform work at the Site and refused to participate in settlement negotiations regarding OU2/4. Dico's behavior is the behavior Congress sought to discourage through the various incentives codified in CERCLA. Dico now wants the Court to interpret CERCLA in such a way that it can "have its cake and eat it too" – refuse to settle, proceed with a contribution action against the Customer Group, and squeeze the settling Customer Group for more than what the District Court already deemed was a fair and reasonable settlement and consistent with the purposes of CERCLA. However, Dico can find no support for this tactic in CERCLA. Indeed, CERCLA sets forth a specific scheme to encourage parties to settle with the government while creating strong disincentives, including the extinguishment of contribution claims, to discourage parties from being recalcitrant.

Dico's displeasure, as manifest as it might be, does not provide the circumstances contemplated under Rule 10 for granting the Petition. While Congress's objectives and

the language of the statute may contravene Dico's agenda, they do not give rise to an unconstitutional taking, nor warrant the invalidation of the Consent Decree.

1. CERCLA's Contribution Protection Provision Prevents Dico's Action Against The Customer Group From Vesting

Congress made its intent to protect settlers from contribution claims clear: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement *shall not* be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2)(emphasis added). The language is unambiguous and leaves no room for interpretation. That this provision can extinguish a CERCLA claim for contribution is evident by its very terms.

Dico attempts to pit the above provision against CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1), which sets forth the ability of a PRP to seek contribution from another PRP. Dico tries to argue that this provision creates a vested right in a contribution action and that such right naturally "trumps" contribution protection. However, as set forth above, this provision merely states that PRPs are authorized to bring contribution actions against other PRPs, something that was not clear under the pre-amended statute. Nothing in the provision states that this is an unfettered, absolute, or vested right. In fact, Section 113(f)(1) states that contribution claims are to be brought "in accordance with this section." The very next provision of "this section" sets forth contribution protection. Such a juxtaposition was not by accident as revealed by this section's legislative history: "The section also confirms a Federal right of contribution . . . and prohibits the assertion

of such rights against a party who has entered into a judically [sic] approved settlement with EPA." H.R. Rep. No. 99-253, *supra*, 1986 U.S.C.C.A.N. at 2861. Congress clearly intended to place limits on the ability of a PRP to bring a contribution action against parties who have settled with the government, preventing Dico's contribution action from vesting.

2. No Other Provisions In CERCLA Indicate An Intent To Grant Dico A Vested Interest In Its Contribution Claim

Dico cannot point to a single section of CERCLA that would suggest Dico, a recalcitrant who had to be ordered to perform cleanup activities at the Site, has a vested interest in its contribution claim against the Customer Group.

a. CERCLA Section 308 Does Not Apply To Judicially Approved Settlements

Dico argues that CERCLA section 308, 42 U.S.C. § 9657 shows Congress's intent to codify a contribution right capable of rising to the level of a vested, constitutionally-protected property right. Section 308 states, in part:

> If an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States . . . such limitation on the right to obtain contribution

> shall be treated as having no force and effect.

However, this provision has no application to the present facts. The Customer Group received contribution protection pursuant to a judicially approved, and not an administrative, Consent Decree. In order for the court to enter the Consent Decree, it first made a finding that the Consent Decree was fair, reasonable, and consistent with the purposes of CERCLA. (*See* Pet. App. 28a-37a.) *See also United States v. Union Electric Co.*, 132 F.3d 422, 430 (8th Cir. 1997). The District Court made these determinations based on a careful reading of the parties' supporting and opposition papers. The Eighth Circuit, after consideration of the briefs, the record and oral argument, upheld these findings. (Pet. App. 13a-16a.)

Because CERCLA section 308 applies only to administrative settlements, and not to Consent Decrees having the procedural safeguards associated with judicially approved settlements, this section is irrelevant to Dico's arguments. The Court need not try to hypothesize scenarios in which CERCLA section 308 may come into play.

b. The Statute of Limitations Has No Application To When Dico's Contribution Claim Becomes A Property Right

Dico repeatedly claims that the statute of limitations set forth in CERCLA section 113(g)(3), 42 U.S.C. § 9613(g)(3), dictates that it has a vested property right in its contribution action. Without any authority cited, Dico purports that CERCLA's statute of limitations was intended to coincide with the vesting of its claim. (Petition 18-19.) Thus, Dico argues that the statute of limitations and the vesting of its contribution action occurred on the same day.

Dico's argument fails for two reasons. First, other than Dico's hopeful hypothesis, Dico offers no factual or legal support for its conclusion; no support for its argument can be found in (1) any provision in CERCLA, (2) the congressional record, or (3) any case law interpreting CERCLA. Dico pulls this argument from the air. Second, Dico is mistaken in identifying the appropriate statute of limitations. No statute of limitations is specified for contribution actions based on UAOs. CERCLA section 113(g)(3), 42 U.S.C. § 9613(g)(3), provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after-
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

CERCLA does not specify the statute of limitations applicable to actions for contribution based on work performed pursuant to a UAO issued under CERCLA section 106, 42 U.S.C. § 9606.[6] Certainly, if Congress intended to link the vesting of Dico's claim to a statute of

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[6] The statute of limitations applicable to Dico's action is the subject of debate among the courts. *Compare, Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191-92 (10th Cir. 1997), *cert. denied*, 522 U.S. 1113 (1998) (holding that absent a triggering event under section 113(g)(3), the limitations set forth in section 113(g)(2) apply) *with Reichhold Chemicals, Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1125 (N.D. Fla. 1995) (holding absent a triggering event no statute of limitations applies).

limitations period, it would have at least specified when the claim vests or when the statute of limitations applicable to the claim accrues. Here, Congress has done neither. Once again, Dico's argument has no merit.

II. EVEN UNDER COMMON LAW DICO'S CONTRIBUTION ACTION AGAINST THE CUSTOMER GROUP DID NOT VEST

Although CERCLA clearly sets forth the rights and limits for parties to obtain contribution under that statute, even under an analysis of the common law, Dico's action did not vest. CERCLA contribution actions are actions between joint tortfeasors. *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997) ("As is the case traditionally in contribution actions between tortfeasors, CERCLA's claim for contribution creates several only liability among PRPs."). Under common law, contribution actions between joint tortfeasors do not vest until there is a final, unreviewable judgment, which there has not yet been in this case. *See Hammond v. United States*, 786 F.2d 8, 11, 12 (1st Cir. 1986) (analyzing United States Supreme Court decisions and holding rights in tort do not vest until there is a final, unreviewable judgment); *see also In re TMI*, 89 F.3d 1106, 1113 (3rd Cir. 1996) ("[A] pending tort claim does not constitute a vested right.").

Dico tries to argue that its right to contribution vested when EPA ordered it to perform work pursuant to the UAOs. Dico claims that at this point its claim became "fixed." Dico's argument fails for two important reasons.

First, Dico erroneously relies on numerous non-tort related cases in which the court held a cause of action vested before a final judgment. (Petition at 17, 18.) These cases actually support the long-established law that a cause of action in tort, such as contribution among joint

tortfeasors, does not vest until a final judgment has been rendered. For instance, in a case relied on by Dico, *Ettor v. City of Tacoma*, 228 U.S. 148, 157 (1913), the Court took great pains in distinguishing the case from one in tort. *Ettor*, 222 U.S. at 157-58 ("In the instant case the action is neither for a tort, nor for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded which required compensation to be made.").

Second, contrary to Dico's assertion, by its nature, a CERCLA contribution action cannot be "fixed" until a final judgment has been rendered. Under common law as well as CERCLA, a party bringing a contribution claim may not recover until it can prove that it has paid more than its fair share of the common liability. *See, e.g., Pinal Creek Group*, 118 F.3d at 1298; *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1302 (6th Cir. 2002). At the time the UAOs were issued to Dico, Dico's claim could not be fixed because its fair share of the total liability had not been ascertained and could not be ascertained until a judgment was rendered.

Both the District Court and the Eighth Circuit rejected Dico's false claims regarding the level of its contribution to Site remediation costs yet, remarkably, the same exaggerations surface again in the Petition. (Petition 2, 25.) Indeed, despite its repeated inaccurate assertions that Dico paid 90 percent of the response costs, the facts demonstrate Dico paid a much smaller fraction of the total costs associated with work performed at the Site. (Pet. App. 16a.) In addition to the work Dico performed under the UAOs, the Customer Group performed a removal action pursuant to the AOC, EPA performed various investigations and oversaw all the work performed at the Site, and EPA determined that extensive operation and maintenance would have to be performed to ensure the long-term effectiveness of the remedy.

The total costs of all work at the Site were estimated to be $8,605,620, with Dico paying no more than its judicially approved fair share. The Customer Group paid the remainder – its fair share of 39% of total cleanup costs (plus a premium). The conclusion, then, is obvious – having paid no more than its fair share, Dico has no contribution claim, vested or otherwise. There is no conspiracy here, as Dico suggests, to rob Dico of something it is entitled to. The Customer Group has paid its fair share and is done. No contribution claim against it can be maintained. CERCLA's statute recognizes this logic and codified it in Section 113(f)(1) and (2). Dico cannot be deprived of something it never had.

III. THE PURPOSES OF CERCLA ARE FURTHERED THROUGH THE EXTINGUISHMENT OF DICO'S CLAIM

The extinguishment of Dico's claim against the Customer Group is precisely what Congress intended when drafting the SARA amendments. Congress drafted CERCLA sections 113(f)(1) and (2) with the purpose of encouraging settlements. As noted by Congress, section 113(f)(1) was intended to encourage private parties to "be more willing to *assume* the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others." H.R. Rep. No. 99-253, *supra*, 1986 U.S.C.C.A.N. at 2862 (emphasis added). Section 113(f)(2) was intended to bring a measure of finality to settlements involving cooperating parties, such as the Customer Group, protecting "[r]esponsible parties who have entered into a judicially approved good faith settlement under the Act [] from paying any additional response costs to other responsible parties in a contribution action." *Id.* As numerous Circuit Courts have recognized, under these provisions, "PRPs who choose to settle gain

protection from contribution, enjoy potentially favorable settlement terms, and retain the ability to seek contribution from other defendants. Those responsible parties who choose not to settle are barred from seeking contribution from the settling parties and thereby face potentially disproportionate liability." *Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2nd Cir. 1998) (citations omitted).

Dico's current fate is precisely what Congress intended when adding sections 113(f)(1) and (2) to the statute. Dico, an owner and operator at the Site during pesticide formulation, and a current owner/operator at the Site, refused to step up and assume responsibility for cleanup costs.[7] Only after EPA ordered Dico to perform cleanup under two UAOs did it perform any work at the

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[7] Dico's reliance on *United States v. Charter Int. Oil Co.*, 83 F.3d 510, 518 n.11 (1st Cir. 1996) to support its position that Congress should not extinguish a claim of a party that incurred costs pursuant to a UAO is misplaced. (Petition 25.) In *Charter*, the court warned that later settlements should not be so broad as to extinguish contribution claims of early "*settlors*." *Charter* 83 F.3d at 518 n.11. Dico, who refused to cooperate with the government and had to be ordered to perform work at the Site, can hardly be considered a "settlor." Likewise, *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994) is inapposite. *Akzo* involved the scope of contribution protection when the consent decree was silent. The court looked to the type of work that formed the basis of the contribution action and the scope of work covered in the consent decree to determine the parties' intent. The court held the Consent Decree at issue did not preclude the contribution action in that case. However, it indicated that contribution protection would have applied had the Consent Decree been more clearly worded. *Akzo Coatings*, 30 F.3d at 766. Here, the Customer Group paid its fair share of *all* costs relating to Site cleanup and Dico does not dispute that the scope of contribution protection is clear in the Consent Decree and encompasses its contribution action. Most importantly, the issue raised in *Akzo*, the scope of the contribution contained in the Consent Decree, is not before the Court.

Site which it owned.[8] Indeed, Dico even refused to participate in settlement negotiations with EPA and the Customer Group[9] involving the funding of future operation and maintenance that will take place on Dico's *own* property.

In contrast, at every stage the Customer Group cooperated with EPA. The Customer Group entered into an AOC with EPA to perform a removal action at the Site. It also entered into settlement negotiations with EPA to resolve all its liability at the Site by paying its fair share of the *total* predicted costs for Site cleanup and future operation and maintenance plus a settlement premium to account for uncertainties associated with the future costs. The money paid by the Customer Group was to be used for reimbursing EPA for its costs, including its costs of overseeing the work performed by Dico, and to assure funding for long term operation and maintenance at the Site. As found by the District Court and the Eighth Circuit, the Consent Decree was fair, reasonable, and consistent with the purposes of CERCLA. The Customer Group is the

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[8] Dico argues that the UAO process is much more desirable for the government than a negotiated settlement: "It obtains immediate remediation of the Site by a private party, without having to compromise, negotiate, or incur costs . . ." (Petition 16.) However, Dico downplays that EPA's oversight costs (which were hundreds of thousands of dollars in the present case) are not covered through the UAO process. EPA must seek them through litigation, which is avoided in the settlement process.

[9] Dico has argued that it did not participate in negotiations because it did not view EPA as "neutral" due to its dispute with EPA over EPA's ability to recover oversight costs with regard to OU1/OU3. (Petition, p. 3 n.3.) Of course, Dico's view was pure speculation since it boycotted the numerous negotiation sessions to which it was invited. Had Dico attended the negotiations, it might have been able to effect changes to the Consent Decree. Dico now has only itself to blame for its displeasure over the terms of the final Consent Decree and the contribution protection that accompanies it.

quintessential party that Congress intended to provide with contribution protection. That Dico, who refused to assume responsibility for cleaning up the Site and would not even participate in settlement negotiations, lost its contribution action against the Customer Group, shows that Congress's incentives to encourage parties to settle work. Perhaps next time Dico or another similarly situated person is implicated at a site it will more readily cooperate with EPA.

IV. CONCLUSION

Dico's gripe is with Congress and not the Judiciary. The fact that Dico's contribution claim has been extinguished as a result of the contribution protection afforded to the parties who entered into a judicially approved Consent Decree is entirely in line with the language and intent behind CERCLA. Dico has made no showing whatsoever that the result in this case is inconsistent with Circuit Court authority, or a statute or a constitutional provision. As the circumstances surrounding Dico's issues bear no resemblance to those contemplated under Rule 10, the Customer Group respectfully requests that the Court deny Dico's Petition for a Writ of Certiorari.

Respectfully submitted,

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May 30, 2002

APPENDIX A

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42 U.S.C. § 9604(a) [CERCLA § 104(a)]

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by

the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

42 U.S.C. § 9606(a) [CERCLA § 106(a)]
(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C. § 9607(a)(4)(A),(B) [CERCLA § 107(a)(4)(A),(B)]
(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date
Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

42 U.S.C. § 9613(f)(1),(2) [CERCLA § 113(f)(1),(2)]
(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such

equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(g)(3) [CERCLA § 113(g)(3)]

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after -

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9622(e)(3)(A) [CERCLA § 122(e)(3)(A)]

(A) In General

The President shall develop guidelines for preparing nonbonding preliminary allocations of responsibility. In developing these guidelines the President may include such factors as the President considers relevant, such as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors.

When it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility.

42 U.S.C. § 9657 [CERCLA § 308] Separability of provisions; contribution

If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby. If an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any such case, such limitation on the right to obtain contributions shall be treated as having no force and effect.

Supreme Court, U.S.
FILED
JUL 1

No. 01-1607

In the Supreme Court of the United States

DICO, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, empowers the United States to respond to releases or threatened releases of hazardous substances and to recover response costs from defined classes of liable parties. 42 U.S.C. 9604-9607. CERCLA also authorizes any person who incurs response costs to seek contribution, but provides that a person who has resolved its liability to the United States in a settlement shall not be liable for claims for contribution for matters addressed in the settlement. 42 U.S.C. 9613(f)(1)-(2).

The question presented in this case is whether the district court abused its discretion in approving a consent decree between the United States and certain settling parties that, in accordance with 42 U.S.C. 9613(f)(1) and (2), gives the settling parties protection from contribution claims.

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In the Supreme Court of the United States

No. 01-1607

DICO, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 277 F.3d 1012. The opinion of the district court (Pet. App. 18a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2002. The petition for a writ of certiorari was filed on April 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the court of appeals' affirmance of the district court's approval of a consent decree (Pet. App. 53a-86a) resolving the United States' claims

against five defendants (the Customer Group) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The consent decree provides for the cleanup of a site in Des Moines, Iowa, that is contaminated with hazardous substances. Petitioner is the owner and operator of most of the site. The members of the Customer Group were customers of a pesticide-formulation business that petitioner's corporate predecessor operated at the site. Under the consent decree, the Customer Group will contribute $2.5 million towards the cleanup of the pesticide contamination at the site. Petitioner declined to participate in the negotiations that led to the consent decree, despite the government's repeated invitations. Pet. App. 3a-4a. At the time of the settlement, petitioner was pursuing a contribution action against the Customer Group. *Dico, Inc.* v. *Amoco Oil Co.*, No. Civ. 4-97-10130 (S.D. Iowa Mar. 13, 2002) (Pet. App. 39a-52a). Over petitioner's objections, the district court approved the consent decree, Pet. App. 18a-38a, and the court of appeals affirmed, *id.* at 1a-17a. Thereafter, the district court dismissed petitioner's contribution action, finding that the consent decree resulted in an absolute bar to petitioner's claim for contribution. *Id.* at 51a.[1]

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). That statute, which Congress revised and

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[1] The Des Moines site has been the subject of extensive litigation. This Court recently denied a petition for a writ of certiorari, filed by petitioner, involving separate issues arising from the cleanup of that site. See *Dico, Inc.* v. *United States*, 122 S. Ct. 2291 (2002) (No. 01-1223).

expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). CERCLA "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); see *Bestfoods*, 524 U.S. at 55-56 & n.1; see also *United States* v. *Mexico Feed & Seed Co.*, 980 F.2d 478, 486 (8th Cir. 1992); *United States* v. *Northeastern Pharm. & Chem. Co.* (*NEPACCO*), 810 F.2d 726, 733 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

CERCLA provides the Environmental Protection Agency (EPA) with two alternatives for cleaning up sites contaminated with hazardous substances. Under Section 104(a), EPA may undertake response actions itself, using the Hazardous Substance Superfund. See 42 U.S.C. 9604(a). Under Section 106(a), EPA may require the responsible parties to undertake the response actions through administrative or judicial orders. See 42 U.S.C. 9606(a). Whichever route is followed, the United States may recover any response costs it incurs through a cost-recovery action under Section 107(a), 42 U.S.C. 9607(a). See, *e.g.*, *United States* v. *Union Elec. Co.*, 132 F.3d 422, 428 (8th Cir. 1997). CERCLA accordingly "places the ultimate responsibility for cleanup on those responsible for problems caused by the disposal of chemical poisons." *United States* v. *Aceto Agr. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (citation omitted). Respon-

sible parties are jointly and severally liable for federal and state response costs.[2]

As a consequence of the SARA amendments, CERCLA provides a statutory mechanism for a liable party to obtain contribution from others when more than one party is liable for a response action. Section 113(f)(1) authorizes actions for contribution, which are to be resolved under "Federal law," applying "such equitable factors as the [district] court determines are appropriate." 42 U.S.C. 9613(f)(1). The right of contribution is subject to Section 113(f)(2), which provides that a party that has "resolved its liability to the United States * * * in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. 9613(f)(2). That provision of "contribution protection" is intended to encourage settlements, thereby "expedit[ing] effective remedial actions and minimiz[ing] litigation." 42 U.S.C. 9622(a). Although a non-settlor's total liability is reduced by the amount the United States is able to recover through settlement, non-settlors remain jointly and severally liable for any costs that the United States has been unable to recover. 42 U.S.C. 9613(f)(2), 9622(h)(4).

2. The Des Moines TCE Site consists of several properties, including the Dico production facility and the Des Moines Water Works. Pet. App. 40a. For more than 30 years petitioner or its corporate predecessors (collectively referred to here as petitioner) manufactured a variety of metal industrial items at the site using various solvents. *Id.* at 31a, 40a. See *United*

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[2] If a responsible party can show that the harm is divisible, it may be liable only for its respective share of the harm. *Acushnet Co.* v. *Mohasco Corp.*, 191 F.3d 69, 75 (1st Cir. 1999).

States v. *Dico, Inc.*, 136 F.3d 572, 575 (8th Cir. 1998). Petitioner also ran a wholesale chemical distribution business and a pesticide and herbicide formulation operation on the site. Pet. App. 40a.

When tests revealed that the public drinking water supply for the City of Des Moines was contaminated with hazardous substances, EPA placed the site on the CERCLA National Priority List and initiated a remedial investigation. Pet. App. 3a; see *Dico, Inc.* v. *Diamond*, 35 F.3d at 348, 349 (8th Cir. 1994); *United States* v. *Dico, Inc.*, 136 F.3d at 574-575. EPA divided the response activities at the site into four phases, termed "operable units." The instant litigation involves operable units (OU) 2 and 4. Pet. App. 3a. OU-2 contains property contaminated by solvents and other volatile organic compounds (VOCs), while OU-4 contains property additionally contaminated by pesticides and herbicides. *Id.* at 20a, 40a-41a.

Thereafter, EPA ordered petitioner to undertake various cleanup actions. Petitioner did so, at a cost of approximately $5.7 million. Pet. App. 4a; see Pet. 2. Simultaneously, EPA and the Customer Group negotiated an administrative consent order under which the Customer Group agreed to carry out additional cleanup work. After petitioner and the Customer Group completed the work, EPA determined that the only remaining response actions necessary for OU-2/4 were (1) long term operation and maintenance and (2) institutional controls to insure that the property is not used for residential purposes. Pet. App. 20a.

EPA then invited petitioner and the Customer Group to negotiate a settlement of their liability for the costs of the remaining response actions at OU-2/4. Pet. App 21a. The Customer Group accepted that invitation, but petitioner repeatedly declined to participate. During

the course of the negotiations, EPA and the Customer Group kept petitioner informed of the settlement talks and the specific terms under discussion. EPA and the Customer Group ultimately reached agreement. See *id.* at 4a-5a. The proposed consent decree was lodged in the district court and published in the Federal Register for public comment. *Ibid.*; see *id.* at 53a-86a (consent decree); 64 Fed. Reg. 69,784 (1999).

The consent decree requires the Customer Group to pay $2,513,808 plus interest in connection with the OU-2/4 cleanup. Pet. App. 62a. Of that amount, $1,296,906 is for reimbursement of EPA's past costs and estimated future costs of overseeing performance of the response action selected in the OU-2/4 record of decision (ROD). The remaining $1,216,902 is to be used to carry out future response actions in connection with OU-2/4. The Customer Group's share of those costs was arrived at using the eight "Gore factors" the agency typically uses to allocate costs in CERCLA cases. *Id.* at 30a & n.4, 63a.

The consent decree provides the Customer Group with "contribution protection" for matters addressed in the consent decree. Pet. App. 70a. As a result, the Customer Group is protected from contribution actions or claims for past and future response costs in connection with OU-2/4, in accordance with Section 113(f)(2), 42 U.S.C. 9613(f)(2). The members of the Customer Group also waive all contribution rights that they may have against any other person for matters addressed in the consent decree. See Pet. App. 70a-71a.

3. After the United States lodged the proposed consent decree, petitioner moved to intervene and to consolidate the case with its pending contribution action against the Customer Group (*Dico* v. *Amoco*, *supra*). The district court granted intervention and

deferred action on consolidation. Pet. App. 5a. It later approved the consent decree over petitioner's objections. *Id.* at 18a-38a. Among other things, the district court rejected petitioner's contention that the contribution bar contained in the consent decree is unfair. *Id.* at 35a-36a.

The court followed the reasoning of the court of appeals in *United States* v. *Cannons Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990), which recognized that the contribution bar in Section 113(f)(2) does not deprive petitioner of any constitutionally protected interest because the contribution right claimed by petitioner was created by Section 113(f)(1) and is expressly subject to the limitation of Section 113(f)(2). Pet. App. 26a-28a, 35a, 37a. The court accordingly rejected petitioner's argument that the statutory extinguishment of its contribution claim implicated the Just Compensation Clause. *Ibid.* The district court concluded that the negotiation process that resulted in the consent decree was procedurally fair and that the consent decree is substantively fair, reasonable, and consistent with CERCLA. *Id.* at 29a, 30a-37a.

4. The court of appeals affirmed. Pet. App. 1a-17a. The court rejected petitioner's various procedural and substantive objections to the entry of the consent decree. *Id.* at 6a-17a. The court specifically rejected petitioner's argument that the consent decree unfairly or unreasonably provided contribution protection to the Customer Group, noting that such protection is explicitly authorized by Section 113(f)(2), is consistent with the underlying goals and policies of CERCLA, and does not provide a basis for constitutional objections. *Id.* at 9a-10a, 16a.

ARGUMENT

The court of appeals correctly determined that the district court did not abuse its discretion in entering the consent decree between the United States and the Customer Group. Petitioner is simply wrong in its assertion that the consent decree's provisions governing future claims for contribution are unconstitutional. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals affirmed the district court's entry of a consent decree that embodies the provisions of Section 113(f) of CERCLA, which governs contribution claims among settling and non-settling parties. See 42 U.S.C. 9613(f); Pet. App. 70a-71a. Although petitioner makes general assertions that the court of appeals' decision "conflicts with decisions of this Court and of other courts of appeals," *e.g.* Pet. 8, petitioner fails to identify any such conflict. To the contrary, the court of appeals' decision is entirely consistent with this Court's decision in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), which recognizes that Congress has broad latitude to define and limit contribution rights among jointly liable parties. *Id.* at 646-647. The court of appeals' decision is also consistent with the First Circuit's decision in *Cannons Engineering*, which correctly recognizes that, because Congress created the right to contribution under CERCLA, in doing so Congress could place limits on that right without implicating the Fifth Amendment. 899 F.2d at 92 n.6. See Pet. App. 9a-10a, 26a-28a.

Petitioner also asserts (Pet. 15) a conflict with dicta in an unpublished district court decision. See *United States* v. *Maryland Sand, Gravel & Stone Co.*, No. Civ.

A. HAR 89-2869, 1994 WL 541069 (D. Md. Aug. 12, 1994). But nothing in the court of appeals' decision conflicts with *Maryland Sand*. In that case, the court concluded that non-settling parties could not have a constitutionally protected property interest in a contribution right because their right to contribution had not yet accrued. *Id.* at *10. Petitioner interprets that ruling to suggest that the non-settlors *would* have had a constitutionally-protected interest if their contribution claim *had* accrued. But the *Maryland Sand* court stated explicitly that, "[e]ven were the Court to find that [the non-settlors] enjoyed a constitutionally protected right to contribution at the time the EPA settled with other PRPs [potentially responsible parties], they were not statutorily entitled to seek contribution from every PRP." *Id.* at *10 n.29. In other words, they could only seek contribution from other *non*-settling parties, and not from the settling parties. See Pet. App. 27a-28a. In any event, even if the court of appeals' decision were in conflict with *Maryland Sand*, a conflict with dicta in an unpublished district court decision does not provide a basis for review by this Court.

2. Petitioner's argument that the court of appeals' decision "conflicts with federal common law" (Pet. 8-9) is based on its misguided view that the contribution rights at issue in this case have a source other than Congress. See, *e.g.*, Pet. 9 n.5, 13. Petitioner's premise is wrong. Before the enactment of SARA, CERCLA did not include an express contribution provision. As petitioner points out (Pet. 9), some courts nevertheless concluded that CERCLA implicitly created a right of contribution. But there is little basis for concluding that federal common law, apart from CERCLA, provided such a right. See *Texas Indus., Inc.*, 451 U.S. at

640-646. Indeed, most courts that inferred such a right thought that the source of that right was CERCLA. See, *e.g.*, *United Techs. Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) ("most courts ultimately ruled that [42 U.S.C.] Section 9607 [CERCLA section 107] conferred an implied right of action for contribution"), cert. denied, 513 U.S. 1183 (1995).

More importantly, to the extent that such pre-SARA contribution rights existed, they are irrelevant to this case. Petitioner's contribution claim was filed 11 years *after* Congress enacted SARA, which added to CERCLA the express contribution provision contained in Section 113(f)(1) and the express limitation on contribution actions contained in Section 113(f)(2). Those express provisions displace any prior implied or federal common law right of contribution. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317-319 (1981) (concluding that the Clean Water Act superseded federal common law of nuisance); *Arizona* v. *California*, 373 U.S. 546, 565-566 (1963) (concluding that federal legislation superseded the federal common law doctrine of equitable apportionment).

Petitioner does not dispute that its contribution claim was brought under Section 113(f)(1). See Pet. 2. And petitioner cannot dispute that Congress has the power to impose limitations on the contribution rights it creates. Thus, petitioner's contribution rights are subject to the limitations set out in Section 113(f)(2). Accordingly, petitioner is mistaken in its contention that the court of appeals' decision conflicts with "federal common law" and "congressional intent to codify a vested and constitutionally protected contribution right" (Pet. 9).

3. Petitioner is also mistaken in asserting (Pet. 13-14) that CERCLA's severability provision, Section 308, demonstrates Congress's intent to codify a contribution right capable of rising to the level of a vested, constitutionally-protected property right. Section 308 states:

> *If* any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby. *If* an administrative settlement under section 9622 of this title has the effect of limiting any person's right to obtain contribution from any party to such settlement, and *if* the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment * * * such limitation on the right to obtain contribution shall be treated as having no force and effect.

42 U.S.C. 9657 (emphasis added). Section 308 merely refers to the hypothetical possibility of a taking of vested rights in the context of administrative settlements, just as it refers to the possibility that provisions of the statute may be "held invalid." Congress simply recognized that vested rights *might* be implicated in a particular administrative settlement. Nothing in Section 308 indicates that Congress affirmatively believed that such rights are in fact generally implicated, any more than Section 308 indicates that Congress believed parts of CERCLA are invalid.

4. The fact-bound character of the case makes further review unwarranted. The court of appeals evaluated the district court's decision under the appropriate standard of review, Pet. App. 13a, and it deter-

mined that the district court did not abuse its discretion in concluding that the consent decree was procedurally and substantively fair, reasonable, and consistent with CERCLA, *id.* at 13a-17a. The question before the court of appeals in this case was a limited one, and the court of appeals properly answered that question based on the specific facts in the record. *Id.* at 13a-16a.

There is accordingly no basis for petitioner's assertion (Pet. 8) that the court of appeals' decision "tells the government that it can always strip contribution rights from a party who has remediated a site; no matter the time, the circumstances, the amount of investment in the assertion of the claims, or even the reduction of the claims to judgment." The court of appeals' decision says no such thing. Rather, it says that, in this case, where the record demonstrates that the consent decree was negotiated in a procedurally fair manner and is substantively fair, reasonable, and consistent with CERCLA, it was not an abuse of discretion for the district court to approve and enter it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(4)

No. 01-1607

IN THE

Supreme Court of the United States

DICO, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

Petitioner, Dico, Inc. ("Dico"), files this consolidated reply to the opposition briefs filed by respondent-chemical companies on May 30, 2002 and by respondent-United States ("the government") on July 1, 2002.

The chemical companies contend that Dico's claims are not protected by the Fifth Amendment because CERCLA, 42 U.S.C. §§ 9601-9675, absolutely prohibits this, or, in the alternative, because there can be no constitutionally protected right absent a final, unreviewable judgment. (Chem. Co. Brf., pp. 14, 18; Gov. Brf., pp. 8-10). These invented theories ignore the language of CERCLA as well as the case-by-case, fact-intensive "takings" analysis that this Court requires.

Contrary to the government's contention (Gov. Brf., p. 8), no federal precedent answers the question before this Court — can CERCLA contribution rights become constitutionally-protected property under the Fifth Amendment after the government forces a PRP to spend millions of dollars in clean-up costs and the PRP spends several years in litigation exercising its contribution rights, but before a final, unreviewable judgment has entered?

CERCLA and common law require an affirmative answer to this question. This petition should be granted because the courts below answered "no," based solely on a circular statutory analysis and without applying this Court's prescribed test for Fifth Amendment takings. Had the court below applied the test, it would have found that Dico's contribution claim is protected by the Fifth Amendment and thus cannot be taken without due process and just compensation.

I. Certiorari Is Necessary Because CERCLA Expressly Recognizes The Property Right Potential In CERCLA Contribution Claims And Because The Contribution Protection Under § 9613(f)(2) Is Not Absolute.

The lower courts held, and respondents contend, that the contribution protection afforded by § 9613(f)(2) is paramount and is not subject to any external limitations or qualifications.

(Chem. Co. Brf., pp. 14-15; Gov. Brf., p. 10). This argument ignores the express language of CERCLA § 9657 and federal case law which imposes additional limits on contribution protection under § 9613(f)(2).

First, Congress recognized in § 9657 of the Act that there are external limits on the contribution protection afforded under § 9613(f)(2). *See General Time Corp. v. Bulk Materials, Inc.*, 826 F. Supp. 471, 477 (M.D. Ga. 1993) (citing § 9657 as proof that Congress recognized the need for due process protection of contribution claims). Indeed, § 9657 expressly recognizes that (1) CERCLA contribution claims can deserve constitutional protection and (2) that when a "taking" results from the application of § 9613(f)(2), the contribution protection must be limited.

Section 9657 is relevant even though it addresses administrative, and not judicial, settlements. CERCLA contribution claims, whether subsequently limited by administrative settlement or judicial consent decree, are all created by § 9607 and governed by § 9613. *See Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924 (5th Cir. 2001). Further, § 9657 specifies that, in an administrative settlement, contribution protection that tramples a vested contribution right must be limited, rather than compensated. This specification recognizes the inherent problems of compensating the taking in the context of an administrative settlement, which may *exclude* the party whose property is taken. The omission of similar language relating to judicially approved settlements leaves courts the option of limiting the contribution protection or compensating the taking. Congress clearly did not do what respondents suggest: allow the taking and ignore the compensation.

The government's attempt to discount § 9657's specific provision regarding contribution is not only unreasonable, it violates fundamental rules of statutory construction. (Gov. Brf., p. 11). The first sentence of § 9657 is a broad savings/severability provision that covers all of CERCLA.

The government suggests that the second sentence ("the contribution clause"), is more of the same. (*Id.*). This interpretation reduces the contribution clause to surplusage — an impermissible result. *See TRW Inc. v Andrews*, 534 U.S. 19, __, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (citations omitted). Instead, basic rules of statutory construction require that the contribution clause be afforded the independent significance that it was given by Congress in § 9657. Reason requires the same construction. It is significant that Congress expressly recognized that § 9613(f)(2)'s contribution protection, *and this provision alone* from all provisions in the statute, could be inconsistent with and subject to Fifth Amendment protections.

Second, courts have imposed other limits on CERCLA's contribution protection. *See Waste Management of Penn., Inc. v. City of York*, 910 F. Supp. 1035, 1040 (M.D. Penn. 1995) ("*City of York*"); *City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153, 1175-76 (D. Kan. 2000). In *City of York*, the District Court recognized that when the government seeks an administrative response cost settlement under § 9622(h), it cannot "extinguish liability to private parties for costs [that private parties] have incurred." 910 F. Supp. at 1040. The court held that a § 9622(h) settlement resolved liability to the United States, but by its terms precluded the government from granting contribution protection from third-party claims. 910 F. Supp. at 1040.[1] While a § 9622(h) response cost settlement is not at issue in this case, the limitation of contribution protection that is hardwired into such a settlement

1. Under 42 U.S.C. § 9622(h)(4) "[a] person who has resolved its liability to the United States *under this subsection* shall not be liable for claims for contribution regarding matters addressed in the settlement." (Emphasis added). The *City of York* court held that the phrase "under this subsection" implicated § 9622(h)(1)'s limit of settlement authority to "costs incurred by the United States Government. . . ." 910 F. Supp. at 1040.

verifies that § 9613(f)(2)'s contribution protection is not absolute, but is qualified by and subject to other provisions of CERCLA.

These limitations to § 9613(f)(2)'s contribution protection within CERCLA establish the fallacy of the lower courts' interpretation that § 9613(f)(2) creates *unlimited* contribution protection, trumping the right to contribution under § 9613(f)(1) in any and all circumstances.[2]

II. Certiorari Is Warranted Because The Lower Courts Failed To Apply The Proper Fact-Specific Test To Determine Whether The Fifth Amendment Has Been Violated And, Instead, Created An Untenable Bright-Line Rule.

It cannot be disputed that Dico holds some type of property right or interest in its claims.[3] The question is what degree of

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2. Contrary to the government's claim, federal precedent does not support the lower courts' decisions in this regard. (Gov. Brf., p. 8) (citing *United States v. Cannons Eng'g Corp.*, 899 F.2d 79 (1st Cir. 1990) and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S. Ct. 2061 (1981)). *Cannons* does not mention the Fifth Amendment, nor does it involve non-settling PRPs who incurred cleanup costs at the time that the consent decree entered. 899 F.2d 79. Further, the Government relies solely on a *Cannons* footnote that disposes of a non-settling PRP's "veiled constitutional argument" by citing *Texas Industries* for the general proposition that "[t]here is no federal right to contribution." 899 F.2d at 92 n.6. *Texas Industries* does not address CERCLA, but held only that the federal antitrust laws do not provide for an express or implied right to contribution. 451 U.S. at 641-42. While the antitrust laws did not provide an express contribution right, CERCLA does. § 9613(f)(1).

3. Courts have described CERCLA contribution claims as property interests subject to due process protection. *Gen. Time*, 826 F. Supp. at 477; *see also Centerior Serv. Co. v. ACME Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998) ("right of contribution" expressly provided by CERCLA); *United States v. Union Electric Co.*, 64 F.3d 1152, 1167 (8th Cir. 1995) (CERCLA contribution claim was "interest" justifying intervention under Fed. R. Civ. P. 24). *See, generally, Logan v. Zimmerman Brush Co.*,

(Cont'd)

constitutional protection must be afforded Dico's claims. The specific factual character of those claims determines whether a taking occurred. The lower courts' approval of the consent decree required a takings analysis.[4] Certiorari is warranted because no such analysis was acknowledged or employed.[5]

(Cont'd)

455 U.S. 422, 428-429, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265 (1982) (stating that causes of action are a species of property protected by the United States Constitution).

4. The government claims that "[t]he fact-bound character of the case makes further review unwarranted." (Gov. Brf., p. 11). Very much to the contrary, the avoidance by the courts below of any factual inquiry required in takings analysis requires further review.

Furthermore, while both the chemical companies and the government attempt to bolster their legal arguments with their perception of the "equities," there has never been a hearing, much less a trial, at which contentions could be exposed to the light of proof and cross-examination. Needless to say, Dico believes the proofs would turn out quite differently.

And while the facts of who was included in the negotiations and when is irrelevant to the consideration of the issues raised in Dico's Petition, if those facts were determined at hearing or trial, Dico would show that it declined the invitation to negotiate initially based upon the positions it asserts here, i.e., that no negotiations or resulting settlement could compromise its Fifth Amendment property rights. Dico would also show that it was not kept apprised of the substance of the negotiations between the chemical companies and the government and that, when Dico discovered a draft of the settlement in a deposition of the chemical companies' witness, it asked for and was denied the opportunity to participate in negotiations many months before the consent judgment was filed.

5. The government incorrectly maintains that an "abuse of discretion" review is proper. (*See* Gov. Brf., pp. I, 12). Because Dico's Petition challenges the lower courts' interpretation of CERCLA and its relationship to the Fifth Amendment, not the fairness of the consent decree itself, this is a legal question for *de novo* review. *See United States v. Colo. & E. R & R Co.*, 50 F.3d 1530, 1534 (1995) (*de novo* review of district court's interpretation of CERCLA).

A. This Court Requires A Fact-Specific Analysis That Was Never Applied.

The chemical companies proffer the illusion that contribution actions between joint tortfeasors are subject to a per se rule: they do not vest until they are reduced to a final, unreviewable judgment. (Chem. Co. Brf., p. 18) (citing *Hammond v. United States*, 786 F.2d 8, 11-12 (1st Cir. 1986) and *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996)). This Court has eschewed such a bright-line rule, requiring instead an *ad hoc* factual inquiry to determine whether a taking of protected property has occurred. *See In re Consolidated U.S. Atmospheric Testing Litig. v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987) (citing *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978), and cited in *TMI*, 89 F.3d at 1113).

In fact, the very cases cited by the chemical companies in support of this bright-line rule undermine it. *Hammond* and *TMI* acknowledge federal precedent that does not follow the chemical companies' rule. *Hammond*, 786 F.2d at 11; *TMI*, 89 F.3d at 1113 (citing *Livermore Labs*, *supra*). That precedent, as well as *Hammond*, assess the specific facts of the case to determine the nature of the right and whether there was a taking. 786 F.2d at 11. *See also United States v. Sec. Indus. Bank*, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982) (retrospective 1978 Act's invalidation of acquired liens constituted taking); *Lynch v. United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) (Economy Act's repeal of insurance constituted taking); *Armstrong v. United States*, 364 U.S. 40, 48, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) (holding that a subcontractor's lien constituted a vested property right subject to Fifth Amendment protections from executive branch action).[6]

6. A critical distinction between the instant case and both *Hammond*, *supra*, and *TMI*, *supra*, is that the claims at issue in those cases were extinguished by Congressional action — by passage of retroactive legislation. Here, Dico's claims were snuffed out by administrative action that is contrary to the enabling statute. Thus, unlike an act of Congress, the governmental action at issue here is not clothed in a presumption of constitutionality. *See, e.g., Hammond*, 786 F.2d at 12.

Neither the chemical companies nor the precedent upon which they rely adequately distinguish federal precedent, including decisions by this Court, holding that a pending cause of action can vest before it is reduced to a final judgment. (*See* Pet. Brf., pp. 17-18) (citing cases). *Hammond* distinguishes some of these cases because the rights vested in some form separate from the statute creating the right (e.g., real property, contract, or a fixed sum). *Hammond*, 786 F.2d at 11.

In this case, Dico's claims became fixed in a distinct and concrete manner, independent of the abstract statutory right, in several ways.

First, Dico's claims vested in the real property that Dico remediated.

Second, Dico's claims vested in the Unilateral Administrative Order ("UAO") issued against it.[7] UAOs require a targeted party to comply with an EPA-defined remediation objective and, due to "the heavy penalties for non-compliance and the impossibility of seeking judicial review in advance" of complying, effectively puts the EPA's actions beyond legal challenge. *See CMC Heartland Partners v. Gen. Motors Corp.*, No. 92C4449, 1995 WL 1902125, *2 (N.D. Ill. Jan. 24, 1995) (UAO's described as "grossly unfair") (internal citations omitted). While a UAO does not specify a fixed sum, it more oppressively specifies the scope of work and requires the PRP to expend *whatever sums necessary* to complete that work to the government's satisfaction. A UAO also operates like an unreviewable judgment because PRP's are prohibited from challenging the fairness of the UAO until after the PRP has complied with it.

Third, Dico's claims also became manifest and fixed when it completed the assigned remediation at a cost of $5.7 million. Indeed this fact alone distinguishes Dico's contribution rights

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7. An UAO is issued under the authority of § 9606 and addresses environmental emergencies. *See Centerior Serv.*, 153 F.3d at 346 n.4. Noncompliance may be penalized at up to $25,000 per day in addition to damages *up to three times* the cost of cleanup. *See id.*

from those asserted by non-settling PRPs who contested contribution protection offered in settlements in federal precedent. *See, generally, Cannons*, 899 F.2d 79.

Fourth, Dico's rights were fixed and independently established when Dico filed and aggressively pursued its contribution claim. CERCLA permits a PRP to file its contribution claim once the government issues the UAO against it.[8] In fact, the statute of limitations begins running almost immediately thereafter.[9] Thus, CERCLA requires PRPs like Dico to further invest in their contribution rights by filing suit, which Dico did. Dico's investment in its claim was significant and well-known to the government — it spent two years and approximately $300,000 vigorously pursuing its contribution claims before those claims were extinguished by entry of the consent decree in this case.

The chemical companies' insistence that Dico's rights do not vest until all response costs are known and incurred and a final judgment has entered would render the promise of contribution wholly illusory. (Chem. Co. Brf., p. 11). Future "operations & maintenance" and oversight costs of this Site, as well as many other sites, continue to be incurred for many years, if not decades. But the statute of limitations on contribution claims runs in only three or six years (depending on the type of contribution claim). The chemical companies's position would force PRPs like Dico into an untenable dilemma of having to file and litigate a contribution claim that is subject to complete divestiture until all site-related costs are incurred, a judgment is won, *and* all appeals are exhausted.

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8. CERCLA § 9613(f)(1) expressly allowed Dico to file its contribution claim once the UAO was issued, i.e., "during or following" a § 9606 UAO action.

9. The statue of limitations began running against the claims once Dico began "physical on-site construction of the remedial action. . . ." *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1193 (10th Cir. 1997); *Centerior Serv.*, 153 F.3d at 354-55; *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1305-06 (9th Cir. 1997).

Certiorari is required because the opinion below adopted this untenable bright-line rule instead of applying this Court's required *ad hoc* and fact-sensitive inquiry.

B. A Proper Takings Clause Analysis Would Find That The Government's Grant Of Contribution Protection Effects An Unconstitutional Taking Without Just Compensation.

The test that the lower courts should have applied, but did not, asks first whether "property" is at issue, and second whether a "taking" occurred. *See Livermore Labs*, 820 F.2d at 988. Here, only the "property" question is at issue because the government completely extinguished Dico's claims, (i.e., if the claims are protected "property," a "taking" occurred). *See Armstrong*, 364 U.S. at 46-48 (destruction of claimants property rights, which had compensable value, was "taking").

This Court has recognized several facts "of particular significance," including the economic impact of governmental action, the interference with investment-backed expectations, and the character of the governmental action. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 523-24, 118 S. Ct. 2131, 2146, 141 L. Ed. 2d 451 (1998). Applying the "significant" factors to Dico's situation proves that a taking occurred. Most compelling among the factors is Dico's investment-backed expectation that it could expect to recoup costs that it incurred, but that were attributable to third parties, through Dico's statutory right to contribution. *See Centerior Serv.*, 153 F.3d at 348. Dico already spent over $5.7 million to comply with the UAOs, and spent an additional $300,000 along with over two years in litigation pursuing its "investment-backed" recovery of contribution costs when the government decided to extinguish Dico's claims. Clearly, Dico had reached a point where it could reasonably expect to recoup money it was ordered by EPA to spend on behalf of other polluters (e.g., chemical companies). *See City of York*, 910 F. Supp. at 1043 ("constitutional concern is greatest . . . where there are substantial costs incurred privately beyond those incurred by the Government").

Also compelling is the nature of the governmental action in this case. Dico incurred the cleanup costs for which it seeks contribution under a UAO. Were it not for the existence of contribution rights against other responsible parties, the essence of the UAO itself might be considered a taking. To eliminate the contribution right, as the government did to Dico, converts the merely "grossly unfair" UAO into an all-powerful and unreviewable governmental ultimatum without check or balance. Here, the government left Dico holding a $6.0 million-dollar bag. *Compare Apfel*, 524 U.S. at 527 (other provisions that mitigate the economic impact on an individual party provides fairness to governmental action); *Livermore Labs*, 820 F.2d at 989 (no taking when alternate avenue for recovery remained).[10]

These facts establish that Dico's property right was taken without just compensation in violation of the Fifth Amendment.

CONCLUSION

For the reasons stated here and in Dico's Petition, Dico requests that this Court grant its petition for certiorari.

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10. It is also significant that the chemical companies paid the EPA roughly $2.5 million pursuant to the consent decree. The EPA had estimated its response costs at less than $1.3 million. Thus, the EPA was receiving over $1.2 million for which it bore no corresponding cost. Given this windfall, the EPA's opinion regarding the fairness of the settlement was, at a minimum, suspect. It is also significant that, while the NBAR set the chemical companies' "fair share" at 39% (which Dico claims to be grossly low), they actually paid only 29% (i.e., $2.5 million of the total $8.6 million in estimated costs). (*See* Chem. Co. Brf., pp. 2 ($8.6 million) & 4 ($2.5 million)).

Respectfully submitted,

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